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FAIRNESS IN BROADCASTING ACT OF 1989

HEARING

BEFORE THE

SUBCOMMITTEE ON COMMUNICATIONS

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

FAIRNESS IN BROADCASTING ACT OF 1989

MARCH 15, 1989

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FAIRNESS IN BROADCASTING ACT OF 1989

WEDNESDAY, MARCH 15, 1989

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE ON COMMUNICATIONS,
Washington, DC.

The subcommittee met at 9:05 a.m. in room SR-253 of the Russell Senate Office Building, Hon. Daniel Inouye (chairman of the subcommittee) presiding.

Staff members assigned to this hearing: Tom Cohen, Toni Cook, staff counsels; and Gina Keeney, minority staff counsel.

OPENING STATEMENT BY SENATOR INOUYE

Senator INOUYE. Today's hearing is on the Fairness in Broadcasting Act of 1989, a bill to reinstate the Fairness Doctrine. This bill will be introduced this morning by Senators Hollings, Danforth, Ford, Exon, Gore, Rockefeller, Bentsen, Kerry, Breaux, Bryan, Robb, Gorton, Lautenberg, Wirth and myself.

This legislation is almost identical to S. 742, which was passed by both the Senate and the House last Congress but vetoed by the President. The purpose of this hearing is to supplement the record with information on the effects of the elimination of the Fairness Doctrine by the FCC.

The Fairness Doctrine provides that broadcasters air important issues of the day and that they provide opportunities for the discussion of conflicting points of view. It carefully preserves the First Amendment rights of both broadcasters and the public. Forty years of experience with the Fairness Doctrine have clearly shown its great value. It is for that reason we are moving forward today to reinstate it.

The Fairness Doctrine is a reasonable condition on the issue of a valuable public resource, the electromagnetic spectrum. Moreover it has served to increase speech on the issues of public importance. As such, it is no more than good journalistic practice.

Supporters of the Fairness Doctrine accept that it may impose a mild burden on licensees. However, we believe that the burden is both necessary and minimal. As the Supreme Court stated in Red Lion, it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.

While the Communications Act limits the rights of viewers and listeners by excluding speakers from the airwaves, it mitigates this damage by enhancing speech to the Fairness Doctrine.

Opponents of the doctrine contend that without the doctrine we would see an increase in the number of controversial issues pre-

sented on broadcast stations. This, however, does not reflect reality. A recent article in Broadcasting magazine, for example, concluded that in the last year there has been a decrease in the amount of time devoted to broadcast station editorials.

This hearing will consist of a panel of four witnesses, Professor Tom Krattenmaker of Georgetown University Law Center, who opposes the Fairness Doctrine; Professor Jerome Barron of George Washington University International Law Center; Professor Anna Goldoff of John Jay College, and Mr. Scott Denman, Safe Energy Communication Council. And I look forward to the testimony of this panel.

Our members here, please step forward. And may I now call upon my distinguished colleague from Oregon, Senator Packwood.

OPENING STATEMENT BY SENATOR PACKWOOD

Senator PACKWOOD. I have a sense of deja vu as we start this hearing again. I do not find that the arguments that are made for or against the Fairness Doctrine have changed very much, but I find with each passing month, each passing year that the arguments for the Fairness Doctrine, in my judgment, get weaker and weaker.

They were initially, of course, premised upon scarcity when the doctrine was imposed upon the broadcast industry almost forty years ago. Then there were certainly fewer broadcasters than there are now—next to no television for all practical purposes in the country, no cable, no videocassette records.

Today we have such a plethora of access to information that one is hard-pressed to say that if every radio station in the country, every television station in the country is not compelled, compelled by law to follow a controversy where we impose the content, that somehow the public is not going to be well informed.

I think the premise almost ought to fail of its own weight, just by judicial notice.

It was almost two years ago that this Subcommittee convened to hear testimony on a virtually identical bill. At that time, the fairness doctrine was still being enforced by the Federal Communications Commission. However, the Courts had decided that the doctrine was not a statutory requirement, but a creation of the FCC. Therefore, proponents of the doctrine felt the need to codify the doctrine to protect it from FCC action.

Since that hearing in March of 1987, much has happened. In August 1987, the FCC concluded that the fairness doctrine violated the First Amendment, and disserved the public interest. Based on this conclusion, the FCC halted its enforcement of the doctrine.

Just last month, the United States Court of Appeals for the District of Columbia Circuit upheld the FCC's decision to eliminate the fairness doctrine. Affirming the Commission's findings that the doctrine chilled free speech and was unnecessary to produce diversity of viewpoints in broadcasting, the Court said that the Commission had acted reasonably when it decided to discontinue enforcement of the doctrine.

Mr. Chairman, I believe these actions are a step in the right direction toward free speech for broadcasters. I have argued over the

years that when the founders wrote "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." they mean to protect all forms of speech, not just the forms that existed at the time. Protection of free speech has failed to keep pace with the growth of new methods of communication. Technological advances have made many of our communications regulatory policies obsolete.

Proponents of the fairness doctrine continue to rely on the "scarcity" principle in defending the need for the doctrine. They claim that because there are more individuals who want to broadcast than impose the fairness obligation on those to whom spectrum is allocated. This type of scarcity may be an appropriate basis to justify some government regulation. For example, FCC licensing is necessary to prevent interference and to permit the operators and the public to have a clear signal. It does not follow, however, that all types of government regulation, including content regulation, are similarly justified.

The governmental interest which the fairness doctrine purports to address is not the interest of any individual in self-expression; rather, its alleged purpose is to further the interest of the public in obtaining access to the marketplace of ideas. The fact that there may be more individuals who wish to speak than the number of available frequencies bears no relation to the public's interest in receiving diverse sources of information. As long as there is a multitude of information outlets supplying diverse opinions, this interest is fulfilled.

In an age when there are more than 10,000 radio stations, more than 1,300 television stations, cable TV, and other developing satellite and electronic information services, one would be hard-pressed to make a case that diversity does not exist.

Mr. Chairman, I believe the FCC made a compelling case that the fairness doctrine is not in the public interest and that it is unconstitutional. The evidence shows that the doctrine chilled the free exchange of ideas rather than promoted speech. For this reason, the FCC's decision to discontinue enforcement of the doctrine was the right one. It would be a grave mistake for Congress to reinstitute the fairness doctrine, returning our electronic media to second-class citizenship, and limiting rather than expanding the application of the First Amendment.

Thank you, Mr. Chairman.

I look forward to the witnesses' statements.

Senator INOUYE. I thank you, sir.

I have opening statements from Senators Hollings and Pressler that I will include in the record at this point.

[The statements follow:]

OPENING STATEMENT BY THE CHAIRMAN

I want to thank the Chairman of the Subcommittee, Senator Inouye, for moving promptly on the legislation we are introducing today to codify the Fairness Doctrine. We are here today because of the misguided views of the Commissioners at the FCC. On August 4, 1987, the FCC repealed the Doctrine despite clear Congressional support for it. It is time for Congress to correct this grievous error in judgement and reinstate the Fairness Doctrine.

I doubt if anybody in this hearing room today has not chosen sides on this issue The debate over the Fairness Doctrine has been going on ever since it became part

of the FCC rules. We all know the Chairman of the FCC, Mr. Patrick, has not been shy about expressing his views on this matter. The Senator from Oregon, Mr. Packwood, has also been direct and persistent in his efforts to abolish the Doctrine. Even I have once or twice expressed a view on the Fairness Doctrine.

The Fairness Doctrine evolved out of the basic premise that broadcasters are licensed to serve the public interest. This regulation was the direct result of the scarcity of the electromagnetic spectrum and the limited number of broadcast channels in each market, as well as the lack of competition to the broadcasters. Because it is impossible to provide channels to everyone that would like to operate a broadcast station, those that have the privilege of being assigned a channel have special obligations and operate as public trustees.

The FCC decision to repeal the Fairness Doctrine was based on three claims: (1) the electromagnetic spectrum is no longer scarce, (2) the increase in the number of broadcast stations and other media outlets has significantly changed the media marketplace; and (3) the Fairness Doctrine has a chilling effect on broadcasters.

The Commission's contention that the spectrum is no longer scarce is utterly baseless. The greatest battles at the FCC take place over spectrum, because it is in such short supply.

The FCC claims about increased competition are also not well-founded. Even though there has been a large increase in the gross number of broadcast stations, this does not necessarily indicate that competition exists. In fact, it does not. Some 2,000 communities are served by a single radio licensee—or AM/FM combination. In this connection, the FCC assertion that new video services create competition is simply wrong when applied to the issue of the Fairness Doctrine. The vast majority of the new video services merely retransmit other broadcast stations or in the case of cable provide no local programming on a regular basis.

Finally, the Fairness Doctrine does not have a chilling effect on broadcasters' speech. Many overlook the fact that the Fairness Doctrine imposes an obligation on broadcast licensees to air matters of public importance in addition to requiring broadcasters to air an opposing viewpoint when only one side of an issue is presented. The FCC argued that once the Fairness Doctrine was eliminated the American public would see a tremendous increase in the coverage of controversial issues. All I have seen is a greater desire on the part of broadcasters to put on entertainment programming to increase their bottom line. I have not seen an increase in editorials or news and public affairs programming.

Today, we are here to cut through all the rhetoric and ideology and look at what has happened since the Doctrine was eliminated. When we see how the marketplace has worked without the Fairness Doctrine, I believe we will clearly see why the public needs the Fairness Doctrine and why it enhances the goals of the First Amendment.

OPENING STATEMENT BY SENATOR PRESSLER

Mr. Chairman, thank you for holding this hearing on the fairness doctrine. As you know, I have been a proponent of this doctrine in the past. The purposes behind it are worthy. It is important that citizens receive adequate and fair coverage of different viewpoints on public issues.

On the other hand there are valid arguments against reinstatement of the fairness doctrine. Sources of broadcast information have expanded greatly since the inception of the doctrine, weakening the argument that there is a scarcity of broadcast outlets. And there is validity to the argument that the fairness doctrine has a somewhat chilling effect on speech.

Are there enough sources of information available now that competing viewpoints are heard even without the fairness doctrine? Maybe it is no longer necessary. Has our recent experience without the doctrine proven anything? Although I look forward to today's testimony on the theoretical consequences of doing away with the fairness doctrine, I also am anxious to hear the witnesses address themselves to our actual experience over the last two years. Have we seen an erosion in fair coverage of controversial issue or not?

I am open to the arguments on both sides of this issue. Thank you again for scheduling this hearing, Mr. Chairman. Today's testimony should help clarify the issue for me.

Senator INOUYE. I will first call upon Dean Krattenmaker, the Associate Dean of the Georgetown University Law Center. Dean.

STATEMENT OF THOMAS G. KRATTENMAKER, ASSOCIATE DEAN, GEORGETOWN UNIVERSITY LAW CENTER

Mr. KRATTENMAKER. Mr. Chairman, I have already submitted a written statement for the committee, Mr. Chairman, and I do not enjoy reading things to people, so if it is okay with you, I would ask that it be put in the record.

Senator INOUYE. May I assure all the members of the panel that your statements have been placed in the record in toto, and they will be made part of the record. So, if you wish to summarize——

Mr. KRATTENMAKER. I think I might summarize one aspect of what I suggested, Mr. Chairman.

In my view the Fairness Doctrine is really misguided regulatory policy, and I think there are a couple of reasons for that. The notion of the Fairness Doctrine is to try to make every station behave in a perfect way to provide news and information for everyone who might want that type of news and information within that listening market.

As I suggested in my written statement, that is like telling a shoe store that it must provide every kind of shoe that everybody might want to buy, whether it be casual shoes, dress shoes, sneakers or galoshes.

I think it is very bad regulatory policy to confuse well functioning markets with perfectly functioning firms. When you ask one company to provide that which everybody wants, you have substituted a large bureaucratic apparatus for the workings of the marketplace.

I think that if you were to simply to look at it as a matter of regulatory policy strategy, you would say my goodness, why do I need this.

Now, because we have had some experience with the Fairness Doctrine, you know what it produces. What it produces is what looks to me like a Rube Goldbergian device. The Fairness Doctrine is one rule that can be written in one or two sentences.

The Fairness Doctrine, however, if you take it seriously, evolves into pages and pages and pages in the Code of Federal Regulations and even more pages in the FCC reports. What is a controversial issue, what is one side of a controversial issue, when is the right time to reply, what if it is before midnight, what if it is after midnight. You have to look at the audience demographics. Is it a different rule if there are lots of stations in the area? or a few stations in the area.

This is not the kind of a situation where you simply come in and say here is what you ought to do, do it. It requires a vast bureaucratic regulatory apparatus to specify in detail what each person must do.

The same thing would happen if you told the Tom Krattenmaker shoe store that it had to carry every line of shoes that anybody might wish to purchase.

I cannot purport to be the world's great expert on regulatory policy in Washington, D.C., but I have been observing it here for about 20 years. And it seems to me that one of the things that goes on is that people capture the high ground by the terms they throw around. This is called the Fairness Doctrine.

A colleague of mine whom I asked to read my testimony said, Tom, it looks pretty good, but I did not know that you were capable of making an argument without doing a sports analogy. So, I offer a sports analogy from baseball. There are white lines running down past first and third base, and they call it the foul line. And I, for the life of me, cannot figure out why because a ball that is on the line is fair.

The term Fairness Doctrine has got things turned around, also if we called the Fairness Doctrine what it is, a user tax on public affairs programming, then maybe it would not sound like such a good idea. Maybe it would be easier to understand why it is simply very bad regulatory strategy, at least. Perhaps it was not in the 1920s and 1930s, but it is certainly bad regulatory strategy in the economic context in which the industry exists today, as was well summarized by Senator Packwood in his statement.

[The statement and questions and answers follow:]

STATEMENT OF THOMAS G. KRATTENMAKER, ASSOCIATE DEAN AND PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER

I am pleased and honored to be asked to appear before this committee again on the subject of the inaptly titled "fairness doctrine." Because I have testified here twice before on this topic, I will not take the Senators' time now with a full recitation of my views. [I attach a copy of Krattenmaker & Powe, the Fairness Doctrine Today: A Constitutional Curiosity and An Impossible Dream, 1985 Duke L.J. 151, which explains my position in detail]. I will be happy, however, to answer any questions this Committee wishes to ask.

Perhaps I can open the discussion by stating my views briefly. First, both proponents and opponents of the fairness doctrine ought to agree that the *Syracuse Peace Council* case was correctly decided by the D.C. Circuit. Since the fairness doctrine was a creature, not of Congress, but of the FCC, the same agency that announced the rule can abolish it.

Further, the FCC, in my judgment, wisely determined to be rid of the doctrine, a doctrine that does not compel fairness but rather penalizes aggressive, public-spirited inquiry.

I realize it is dangerous to simplify complex policy discussions. Believing, however, that this is often what they pay law professors to do, I offer the following summary of the dispute.

Proponent of the fairness doctrine believe that this is a case in which two wrongs make a right. The government, having created a monopolistic communicator (radio and television or radio or television) has the right, perhaps the duty, to impose otherwise impermissible content restrictions on that speaker.

Opponents of the fairness doctrine, like me, deny both the premise and the logic of the claim. Neither radio nor television nor radio and television monopolizes the transmission of public affairs information. Further, if they did, government's role would be to break up the monopoly, not to impose official censorship on it.

As a policy matter, requiring every AM radio station to provide comprehensive and balanced coverage is like forcing every manufacturer of footwear to provide a full line of dress shoes, casual shoes, sneakers and boots. It substitutes for the laudable goal of creating well-functioning *markets* the silly and unattainable goal of producing perfect *firms*.

As a constitutional matter, the so-called fairness doctrine trashes a central policy of free speech—that editorial control over what is said should be lodged in private, not governmental institutions. It does so out of expressed fears about the results that non-regulation will generate. But our unregulated medial produce no such evils. Therefore, I suspect that the true fear is that someone, somewhere may utter something unorthodox.

Finally, let me suggest this way of thinking about the issue. My younger son will soon be taking the College Boards. If confronted with this question—"The First Amendment commits us to speech that is (a) fair; (b) free"—I hope he would select "(b)". I urge this Subcommittee to reach the same conclusion.

Question 1. In her testimony, Professor Goldoff presents evidence that the Fairness Doctrine does not have a chilling effect on broadcasters. If her evidence is correct, how does that effect your position?

Answer. I have never seen Professor Goldoff's research data. Since the Fairness Doctrine applies only to those who cover controversial public issues it operates in the same fashion as a tax on covering such issues. Taxes do not always deter people from engaging in the taxed activity, but I doubt they ever create a positive incentive to engage in that activity.

Question 2. It has been argued that since the Fairness Doctrine was eliminated there has not been an increase in the coverage of controversial issues presented on broadcast stations. For example, a recent article in *Broadcasting* magazine states the amount of time devoted to station editorials is declining. If that is true, doesn't it undermine the FCC's contention that the Fairness Doctrine had a chilling effect on broadcasters?

Answer. Such evidence, if ture, would be some indication that the Doctrine's chilling effects are outweighed by the forces of competition and the desire to comply with journalistic ethics. Given the very short time-frame available for the study, I would give very little weight to it, however it came out.

Question 3. Dean Krattenmaker, in view of the present debate concerning how to allocate spectrum for High Definition Television and cries of the land mobile radio licensees that they need more spectrum, do you believe that the assertion that the spectrum is not scarce remains valid?

Answer. The electromagnetic spectrum is, always has been, and always will be a scarce resource.

Senator INOUYE. Professor Barron.

STATEMENT OF JEROME A. BARRON, PROFESSOR OF LAW, GEORGE WASHINGTON UNIVERSITY NATIONAL LAW CENTER

Mr. BARRON. Well, I also, Senator, have provided the committee, as you know, with a written statement which I understand will be in the record. I have a few additional comments on this bill and on the Fairness Doctrine in general.

In the years since the 1949 Report on Editorializing was issued—that is the report that gave life to the Fairness Doctrine—the fortunes of the Fairness Doctrine have varied. A high water mark was achieved in 1959 when section 315 of the act was amended—an amendment which I believe codified the Fairness Doctrine. Indeed, in my view, it is unfortunate that this legislation is necessary because I believe it is already the law.

Perhaps the great event in the life of the Fairness Doctrine is the decision in *Red Lion* when the unanimous Supreme Court upheld the First Amendment validity of both the Fairness Doctrine and the personal attack rules.

The Fairness Doctrine is an example of the inclusiveness of the First Amendment. It illustrates that the First Amendment protects not only the communicators but those whom they communicate with, I want to emphasize that the campaign that the FCC has been waging to suggest that the Fairness Doctrine is a violation of the First Amendment is, terribly misguided.

I take a populist view of the First Amendment. I believe the First Amendment confers rights on everyone, that the guarantee of freedom of speech is no less significant than the guarantee of freedom of the press. I do not believe that the guarantee of freedom of the press is a particular conferral of specific rights to the print media alone. Whenever there is talk of absolute freedom of any one group, we have to be extremely cautious because it is often bought at the price of freedom for others.

There is a fundamental inequality in communicating power in this nation. Even public figures and public officials who have chosen the public life ought not to be without some recourse to protect their reputations. It would be the greatest caricature of the First Amendment to say at the end of the twentieth century that freedom of expression is meant only to protect the freedom of those who have an ownership interest in the great corporations that control our print and broadcast media.

The ordinary citizen finds himself in a very difficult situation, placed between two giant behemoths, giant government and giant media. It has been the genius of the American experiment that we have managed in our pragmatic way to allow a free scope to business and at the same time to be ever mindful of the rights and claims of individuals to privacy, reputation and expression. All of those claims are embattled today as a result of the rise of giant media. Solutions will have to be found that give additional protection to individuals.

There is one argument which is abroad which I would like to speak just a minute or so on. It is said that in 1949 when the doctrine was born, or 1959 when the statute was amended, or 1969 when the Supreme Court held that it was consistent with the First Amendment, the state of the electronic art was different than it is today.

The argument is that the scarcity rationale upon which the Fairness Doctrine is constructed is no longer of continuing validity. In short, it is said that with the rise of cable, with the explosion of communications technology, with the use of direct broadcast satellites and the new abundance of electronic voices, that the old scarcity rationale is outmoded. There is no question that we now possess the hardware to provide a diversity of ideas in the electronic media.

But does that diversification yet exist? I do not believe it does. The hope is that these new media will provide new communications outlets and rapidly render concerns about the need for alternatives to network programming outdated and overstated.

This is our traditional hope that continued progress in technological engineering will make social engineering unnecessary. But like most attempts to find social solutions in hardware, the attempt to find diversity through new communications technology is also somewhat overstated.

Cable is now in its early adolescence. If we measure the contribution of cable from what it has in its own voice been able to say, I do not think it said very much. This is not to say that cable is not a valuable resource. But it is to say that unless cable manages to find a voice of its own and unless the ownership of cable is kept quite distinct from the ownership of broadcasting, cable will remain an unequal rival.

I am skeptical about claims that these new media will greatly diminish the importance and power of the established prestige media. Alternative modes of communication, the development of new commercial networks as well as cable systems that really do program origination should, of course, be encouraged. But I do not think we should expect them in any immediate way to steal the thunder of the dominant media.

This means that we should be very careful of claims that the dominant media should be completely without any form of accountability on the ground that their days are numbered and their power is overstated.

New technology may solve some measure of the problem, but in the largest respect we have got to look to law for the weighing of competing rights for a good deal of the solution. We must begin to recognize that the great conflict that exists, the great disparity in communicating power between the freedom of speech of the public and the freedom of the press of the media, the meaning of freedom of expression is not exhausted by according protection to the media. Such freedom is of great importance, but we must also understand that the perspective of the First Amendment is not elitist and exclusive, directed to the press alone, but that its perspective is instead individualistic and humanistic and belongs to all the people.

The fairness principle is a continuous reminder of the wise words of Justice White in the *Red Lion* case. There is no sanction in the First Amendment for unlimited private censorship operating in a medium not open to all. In short, the Fairness Doctrine is needed in this era of concentration of ownership more than it has ever been needed before, and I enthusiastically support the Fairness in Broadcasting Act of 1989. Thank you.

[The statement and questions and answers follow:]

STATEMENT OF JEROME A. BARRON
LYLE T. ALVERSON PROFESSOR OF LAW, NATIONAL LAW CENTER, GEORGE WASHINGTON UNIVERSITY, ON THE FAIRNESS IN BROADCASTING ACT OF 1989, 100th CONG. 1ST SESS., BEFORE THE SENATE COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION

March 15, 1989

I.

The First Amendment and Political Debate

Good morning Mr. Chairman and Members of the Subcommittee. My name is Jerome A. Barron. I am a member of the law faculty at George Washington University where I have a been a teacher and writer on First Amendment and communications law issues for a number of years.

The FCC has labored hard to persuade the Congress and the country that the fairness doctrine violates the First Amendment. I believe that this disinformation campaign is both misguided and incorrect. I believe that the fairness doctrine implements and enhances the First Amendment. In New York Times v. Sullivan, 376 U.S. 254 (1964), Justice Brennan observed that the First Amendment secures "freedom of expression upon public questions". This is precisely what the fairness doctrine does.

In New York Times v. Sullivan, Justice Brennan said that the libel issues in that case should be considered against "the background of the profound national commitment to the principle that debate on public issues should be uninhibited, robust and

wide-open." If you will examine this statement, it is clear that its language and its objectives do not differ from the statement in the Fairness in Broadcasting Act of 1989 that a broadcast licensee "shall afford reasonable opportunity for the discussion of conflicting views on issues of public importance." In short, in New York Times v. Sullivan, supra, whose twenty-fifth anniversary we celebrate this month, we encounter the idea that the First Amendment should be interpreted to encourage political debate. The "actual malice" doctrine of the Times case offers such judicially created encouragement. The purpose of the Fairness in Broadcasting Act also seeks to advance and effectuate political debate.

II.

The Fairness Doctrine And Sec. 315

Before I go any further in stating my reasons for my belief that the fairness doctrine is consistent with the First Amendment, I would like to say that I regret that it is necessary for the Congress to have to re-enact the fairness doctrine into law. I disagree with the Judge Bork's view in the TRAC case that the Congressional ratification of the fairness doctrine in the 1959 Amendment is inconsistent with codification. See TRAC v.FCC, 801 F. 2d 501 (D.C.Cir. 1986). Judge Bork's view is tantamount to letting the FCC do whatever it wants with the doctrine. This view contributed mightily to the FCC's post-TRAC action in repealing the fairness doctrine altogether.

When Congress enacted the 1959 Amendment to Sec. 315, it gave the force of statutory law to the basic policy of the fairness doctrine. This means that the basic fairness principle is now part of the Federal Communications Act and the FCC has a duty to enforce it. Of course, the FCC like any administrative agency enforcing the public interest, of which the fairness doctrine is a specific ingredient, would have latitude in enforcement. Some variations by the FCC in the scope of fairness doctrine coverage and in the mode of enforcement would, therefore, be permissible. For example, the decision in the 1974 Fairness Report, 48 FCC 2d 1 (1974), to exclude ordinary or conventional product advertising from the scope of fairness doctrine coverage is such a variation. But the FCC has done far more than this. The FCC has scrapped the fairness doctrine entirely. In my view, this is entirely impermissible.

In 1959 Congress ratified and codified the basic policy of the fairness doctrine. Justice White in Red Lion provided a meaningful analysis of the language of Sec. 315 whereby Congress gave statutory status to the fairness doctrine: "This language makes it very plain that Congress, in 1959, announced that the phrase 'public interest,' which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues. In other words, the amendment validated the FCC's general view that the fairness doctrine inhered in the public interest standard....Here, the Congress has not just kept

its silence by refusing to overturn the administrative construction but has ratified it with positive legislation."

It seems to me clear from the foregoing that the fairness doctrine was both ratified and codified by Congress and that, therefore, the FCC was without legal authority to repeal part of its statutory mandate. The TRAC case has obscured the issue. The present FCC has been delighted to exploit the resulting ambiguity by repealing the doctrine. Certainly, it is the merit of the bill under discussion here this morning that its enactment by Congress will make it unmistakably clear that compliance with the fairness doctrine is a legal obligation on the part of broadcast licensees. Furthermore, this bill will make it clear that it is the duty of the FCC to see to it that obligation is fulfilled. What is regrettable is that the Congress has had to shout itself hoarse on this matter of fairness and that Congress's most unresponsive audience in this regard is the FCC. Congress is only now underscoring by this legislation what a fair reading of the present law already provides.

III.

The Constitutionality of the Fairness In Broadcasting Act: The Syracuse Peace Council Case

The next and related question is whether the fairness doctrine is constitutional. Particularly relevant to

the question of whether the Fairness in Broadcasting Act of 1989 is consistent with the First Amendment is a recent decision by the United States Court of Appeals for the District of Columbia, Syracuse Peace Council v. FCC, United States Court of Appeals for the District of Columbia, February 10,1989, Slip Opinion No. 87-1516. The decision went out of its way to avoid supporting the FCC's view that the fairness doctrine is unconstitutional. Although the Court of Appeals panel upheld the FCC's refusal to enforce the fairness doctrine against Meredith Broadcasting, Judge Williams stated: "Although the Commission somewhat entangled its public interest and constitutional findings, we find that the Commission's public interest determination was an independent basis for its decision and was supported by the record. We uphold that determination without reaching the constitutional issue." Slip Opinion,p.4. In my view, the 1985 Fairness Reportz, 102 FCC 2d 143 (1985), is grounded on the idea that the fairness doctrine violates the First Amendment Judge William's efforts to separate the public interest and the constitutional issues suggest to me that he and Judge Wald have grave doubts concerning the FCC's position that the fairness doctrine violates the First Amendment.

Moreover, in a separate concurrence, Judge Starr disagreed that the 1985 Fairness Report had a separate non-constitutional foundation. Although he thought the FCC order refusing to uphold the fairness doctrine against Meredith Broadcasting should nonetheless be upheld, he also thought

Congress was entirely free to re-enact the fairness doctrine: "Vindication of the constitutional reasoning in the (FCC) order would not constitute a judicial determination that the fairness doctrine as (currently administered) is 'unconstitutional.' To reiterate: I would hold only that the FCC's decision to eliminate the fairness doctrine correctly interprets Red Lion and is based, as the court's opinion effectively demonstrates, on an adequate' factual record. Such a decision would therefore not foreclose a future FCC (or Congress) from reestablishing the fairness doctrine in its present or (some modified) form." Slip Opinion, Starr, J., concurrence, p.17.

IV.

Fairness And The First Amendment

If this bill is passed by the Congress as I hope it will be - and if the President does not veto it as I hope he will not - I think we can expect a First Amendment challenge to its validity. Even though the fairness doctrine has been sluggishly enforced by the FCC in recent years, its foes in the FCC and the broadcast industry rightly see it as a symbol which must be destroyed. They see it as a symbol of the public's ownership of the airwaves and of the legal obligation of broadcasters to serve as trustees for the public. It is precisely for these symbolic reasons, if for no others, that the fairness doctrine

must be restored. I applaud this Committee for its efforts in that regard. I am confident that when that the constitutional challenge comes, this will be held valid.

What guidance may we obtain from the decisions of the Supreme Court on this question? Past Supreme Court decisions (Red Lion v. FCC, 395 U.S.367 (1969), CBS v.DNC, 412 U.S. 94 (1973), and CBS v. FCC, 453 U.S.367 (1981)), have been emphatic that specific federal legislation designed to enhance freedom of expression in the broadcast industry is entirely consistent with the First Amendment. In 1969, in Red Lion, Justice White said that in the clash that sometimes occurs between the First Amendment rights of broadcasters and the First Amendment rights of listeners, it was the rights of listeners that took precedence. To this effect, Justice White made a famous utterance: "It is the right of viewers and listeners, not the the right of broadcasters which is paramount." More than a decade later in 1981, the Supreme Court once again re-affirmed these views in CBS v. FCC.

We need the fairness doctrine. American public life needs to insist on retention of that doctrine and its kindred policies. The CBS v. FCC case is very instructive on this. That case was concerned with Sec. 312(a)(7) of the Federal Communications Act rather than the fairness doctrine. Nonetheless, it is very pertinent to the issues at stake in this effort to restore the fairness doctrine. For this reason, I am going to try to briefly summarize the facts and issues of the

CBS v. FCC case in order to show why that case stands as First Amendment authority for the continuing First Amendment validity of the fairness doctrine.

In the fall of 1979, the Carter-Mondale Presidential Committee requested the three major television networks to provide time for a 30 minute program during the first part of December 1979 to present a documentary outlining the record of his administration. The idea was that this documentary would be presented in conjunction with President Carter's formal announcement of his candidacy for a second term. The networks refused to make time available. A provision of the Federal Communications Act of 1934 says that a broadcaster's license can be revoked for "willful or repeated failure to allow reasonable access to, or to permit purchase of, reasonable amounts of time for the use of broadcast stations by a legally qualified candidate for federally elected office on behalf of his candidacy." 47 U.S.C. Sec. 312 (a)(7).

The Carter-Mondale Committee filed a complaint with the FCC charging that the networks had violated their obligation to provide "reasonable access." The FCC decided that the networks had indeed violated the statute and the United States Court of Appeals affirmed the FCC's decision.

Although recognizing that, as in Red Lion, it was dealing with a case of First Amendment rights in conflict, the Supreme Court held that the "reasonable access" provision did not violate the First Amendment rights of broadcasters. This was not a case

where only the voters and the candidates had a First Amendment claim, or where only the broadcasters had a First Amendment claim, it was a claim where both did. In sum, the Supreme Court found in the First Amendment a source of protection for both broadcasters and for individuals.

In rhetoric reminiscent of the current fairness controversy, counsel for the networks contended that an obligation to provide reasonable access inhered in the public interest standard. To the extent that the statute gave specific reasonable access rights to candidates for federal political office, it impermissibly intruded on the First Amendment rights of broadcast journalists to editorial autonomy. So in this current controversy on the fairness doctrine, many in the media and their allies in the FCC, contend that according specific rights to the public under the fairness doctrine intrudes on editorial autonomy rights, protected by the First Amendment, of broadcast journalists.

CBS v. FCC ruled that the FCC's decision that President Carter should have been given time under the reasonable access provision was correct. Further, the Court declared that the statute providing such access was consistent under the First Amendment. Why? Chief Justice Burger said that the "reasonable access" provision made a "significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process." Political freedom and

dialogue were better served by yielding to the Carter-Mondale Committee's claim for access than to the network claim of intrusion into editorial autonomy.

What about the editorial autonomy claim? If the law requires broadcasters to carry programming they would not otherwise carry, doesn't such a requirement constitute an intrusion into editorial judgement? Of course, it does. But CBS v. FCC concluded that the interest in informing the electorate outweighed the undoubted incursion into editorial discretion occasioned by the application of the "reasonable access" law.

The same First Amendment philosophy which justified the "reasonable access" law justifies this re-enactment of the fairness doctrine. These laws respond to a twentieth century reality. There is a great disparity in communicating power - between the freedom of speech of the public and the freedom, of press of the media. How do we achieve any semblance of equivalence in communicating power between the public and the media? How do we, in an age when the mass media encompass the nation - indeed the world - give voice to our own citizens? The fairness doctrine makes a modest effort to provide that voice.

More extravagant claims for a public voice in broadcasting than that presented by the fairness doctrine have been made in the past. In CBS v. DNC, 412 U.S. 94 (1973), the Court rejected claims that the First Amendment of its own force provided rights

of access to the electronic media. But the nature of that rejection has great bearing on the argument that the fairness doctrine violates the First Amendment. Since providing rights of access would give others fairness rights, it was argued that the fairness doctrine should be suspended in favor of a First Amendment based right of access to the electronic media. Chief Justice Burger responded that if the fairness doctrine were abandoned to alleviate these problems, we might lose more than we have gained: "Under such a regime, the Congressional objective of balancing coverage of public issues would be seriously threatened." In addition, Chief Justice Burger felt that in light of the existence of the fairness doctrine, it was not necessary to have a First Amendment based right of access. In short, Chief Justice Burger denied in CBS v. DNC that the First Amendment required trading fairness for access.

The proposition set forth in CBS v.DNC then is not only that the fairness doctrine is constitutional but that it implements the First Amendment interest in balanced coverage of public issues. In CBS v. DNC, the Supreme Court refused to trade fairness for access. Now fairness has not been traded; instead it has been abandoned. This radically alters the First Amendment situation of the electronic media which Chief Justice burger surveyed in CBS v. DNC. The reasoning of that opinion depends entirely on the assumption that the fairness doctrine would have continuing force and vitality in American broadcasting.

V.

The Fairness Doctrine And the Scarcity Rationale

It may be argued however that the assumptions in the cases I am relying on depend on an electronic landscape that was much more and limited and far less varied than the electronic landscape of today. Justice Brennan's remarks in FCC v. League of Women Voters, 468 U.S. 364 (1984), have been particularly influential in this regard and I wish to respond to them. Justice Brennan pointed out that critics of the fairness doctrine have suggested that the emergence of new media challenge the scarcity rationale upon which the doctrine is based. Therefore, they contend the fairness doctrine is outmoded. Although Justice Brennan made it clear that he thought the fairness doctrine was still the law, the FCC was emboldened by these observations to repeal the doctrine.

In light of the individual's interest in self-expression and in access to ideas, what will be the effect of a repeal of the fairness doctrine? I find it hard to believe that the information rights of the public can be adequately protected in broadcasting if the legal basis for those rights is removed. We are told that the scarcity rationale, which justifies broadcast regulation in the first place, as well as structures for debate such as the fairness doctrine, are now outmoded.

~~of abundance so that~~ Where in the past there was scarcity, there is now abundance. This is beguiling doctrine, but it is, in my opinion, wholly untrue.

It is still not possible to get an additional VHF TV license in New York, Los Angeles, Boston, Chicago, San Francisco or Houston. The spectrum has not been expanded. I understand the argument that with the development of satellite communications and cable there are now alternative media which may diminish the importance of conventional broadcast media. But this is quite different from saying that the problems presented by the scarcity of the spectrum have been removed.

The alternative media are not fully fungible with the broadcast media. If someone is watching a movie on the video home recorder rather than watching a network documentary, this does not mean that there is an increase in news and public affairs content in the electronic media. It may only mean that the impact on the opinion process of those in the electronic media who are frankly in the business of opinion making is more important than ever. Incidentally, if we don't need the fairness doctrine because the conventional broadcast media are no longer important vis-a-vis the opinion process, then it would seem to me that whatever chilling effect the fairness doctrine might have might also be considered insubstantial.

I think retention of the fairness doctrine is still enormously important. We may have new electronic media but we still have nothing which rivals the significance and the power of VHF television. The fairness doctrine conveys a symbolic message. It conveys the message that the public has rights in broadcasting. It is a declaration that the licensing of broadcasters is not merely a technicality, but is a legal arrangement which is conditional - the condition is that the interest of the public be served. Justice White said in Red Lion: "Those who are licensed stand no better than those to whom licenses are refused."

The fairness doctrine is an illustration of a fundamental principle of the Federal Communications Act: The publically-owned airways are licensed to the members of the private sector to accomplish public purposes. These purposes are not only consistent with the First Amendment, they effectuate First Amendment goals.

In summary, the fairness doctrine should be retained. This bill will achieve that goal. The fairness doctrine reflects the symbolic title of the American people, in all their variety and diversity, in the licensed electronic media. To repeal the fairness doctrine is to rob the people of that title. This bill restores to the people what belongs to them. It secures the First Amendment rights of the American people in freedom of expression.

QUESTIONS OF THE CHAIRMAN

Question 1. Professor Barron, in his testimony, Dean Krattenmaker contends that there is nothing special about the broadcast industry that justifies the regulations such as the Fairness Doctrine. Do you agree with this?

Answer. As I said in my Statement (p. 13) on the Fairness in Broadcasting Act which I filed with the Committee, it is still not possible to freely enter the VHF TV business in major markets. In the major markets—such as New York, Los Angeles, Boston, Chicago, San Francisco and Houston—VHF licenses are simply not available. They have all been parceled out. There is insufficient spectrum space for new entrants. If one sought to acquire an existing license in these markets by transfer, there is a multi-million dollar purchase price. The scarcity rationale which has been the enduring rationale for broadcast regulation still has continuing special relevance for the broadcasting industry despite the emergence of new communications technologies.

Furthermore, the scarcity rationale is not the only rationale which justifies broadcast regulation. In *FCC* v. *Pacific Foundation*, 438 U.S. 726 (1978), the Supreme Court upheld FCC regulation of indecent expression on broadcasting on a social impact theory. Emphazing life and the unique presence of broadcasting to children, the Court used this social impact approach as an independent justification for broadcasting regulation in the circumstances of that case. But, obviously, the characteristics of broadcasting mentioned by the Court in *Pacifica* have relevance for other broadcasting contexts.

Still another basis for broadcast regulation would proceed along the lines of a government benefit theory. Existing licensees receive a benefit from government that newspaper owners do not have. A federal agency stands guard over their award of a license. In such circumstances, the government benefit can properly be accompanied by appropriate trusteeship responsibilities such as the fairness doctrine.

Question 2. Professor Barron, Professor Krattenmaker and other opponents of the Fairness Doctrine contend that broadcast stations ought to be held to the same standard as the print media. In support of this argument, it is often noted that many newspapers transmit their papers via satellite to be printed in other locations. Do you believe that the use of satellite transponders to expedite distribution of newspapers is analogous to the broadcasters transmitting their signals to individuals homes?

Answer. The difficulty with this analogy is that it confuses the means of distribution with the mode of communication. If a newspaper has a satellite plant, the use of such a plant does not make the newspaper a broadcaster. The newspaper is merely using a privatized service. If there were a technological limitation problem with the use of satellite transponders, then perhaps some analogy to broadcasting would be meaningful. In that case, the scarcity rationale used in broadcasting would have relevance in this setting also. But there is no technological scarcity problem with the use of satellite transponders (as there is, for example, in the case of VHF television) and, therefore, there is no analogy to broadcasting.

Senator INOUYE. Thank you, Professor.

Mr. Denman.

STATEMENT OF SCOTT DENMAN, DIRECTOR, SAFE ENERGY COMMUNICATION COUNCIL

Mr. DENMAN. Thank you. I am Scott Denman, the director of the Safe Energy Communication Council. My testimony today is presented on behalf of the Council and the U.S. Public Interest Research Group. We commend the subcommittee for holding this hearing on the merits of the Fairness Doctrine need for codification.

For eight years SECC has assisted local and statewide environmental and consumer organizations to use the Fairness Doctrine to ensure that all sides of controversial issues of public importance are adequately addressed in overall programming on radio and television. Through its network of state PIRGs, U.S. PIRG has provided Fairness Doctrine information and assistance to its members to achieve the same goal.

The Council's and U.S. PIRG's experience is that the Fairness Doctrine under normal and full operation enables the public to obtain more viewpoints than otherwise would be broadcast on issues of public importance. Consequently, it is easy to understand why a national public opinion poll commissioned by Electronic Media found that Americans support the Fairness Doctrine virtually two to one.

Looking back, between 1981 and the August 1987 FCC decision to abolish most applications of the Fairness Doctrine, the Council assisted local groups with the Fairness Doctrine in some 28 instances in 17 states. In only one instance, in what became the *Meredith/Syracuse Peace Council* litigation, did the local group file a complaint with the FCC. Otherwise, the doctrine worked smoothly to ensure citizen/broadcaster dialogue, thus improving subsequent coverage of the issues. If any, disputes were resolved without government involvement.

In practice, the doctrine is essentially self-enforcing. In these cases the doctrine was applied without the preemption of a single moment of planned programming.

Let's take a more recent look. The 1988 fall election cycle provided a unique opportunity to measure the real influence of the Fairness Doctrine. The FCC continues to administer the doctrine as it applies to election-related matters, but certainly not all broadcasters were aware of or understood the policy after the August 1987 decision. This has caused considerable confusion for some broadcasters and misinterpretation by others.

Last fall, SECC and the U.S. PIRG aided groups in Massachusetts, New Jersey, California, Washington and Montana, working with the Fairness Doctrine in local and statewide referenda. In the past, we encountered few difficulties when a licensee's programming was unbalanced. Normally a consequence of the sale of advertising to advocates of one side of an issue, the problem was usually resolved without much difficulty.

Of 432 radio and television stations that carried programming addressing referendum issues in the five states, SECC and U.S. PIRG found that virtually one-third (or 135 stations) of the licensees did not initially realize that the Fairness Doctrine was still in existence with regard to ballot issues and, therefore, denied their obligation. 98 percent of the remaining 297 stations that accepted the Fairness Doctrine's existence, immediately or subsequently agreed to fulfill their obligation to provide their audiences with additional programming when the problem was called to their attention.

However, in striking contrast, only 56 percent of those 135 stations that initially denied the doctrine's existence eventually presented opposing points of view, normally after being informed that the FCC was still enforcing it for ballot issues. And yet, in spite of this evidence, 14 percent (or 59 stations) continued to refuse to honor their Fairness Doctrine obligations.

Overall, it is impressive that 85 percent of the 432 stations ultimately did provide additional air time for opposing points of view during these referendum campaigns. Our findings demonstrate the compelling need for the immediate codification of the Fairness Doctrine. The performance of those who incorrectly or initially as-

sumed that they had no Fairness Doctrine duties, nearly one third of all stations, shows the deleterious effect of the repeal of the doctrine on the public's ability to be exposed to both sides of controversial issues of public importance.

SECC and the U.S. PIRG found that broadcasters often do not accurately present opposing points of view of controversial issues of public importance without the impetus of the Fairness Doctrine. The differential response between those broadcasters who knew the doctrine was in effect and those who did not is a clear measure of the positive impact of the Fairness Doctrine.

In other words, when broadcasters knew that the Fairness Doctrine was in place, they carried more coverage of more points of view without the need for complaints to be filed.

Prior to its repeal, the Fairness Doctrine guaranteed an environment where political discussion on the airwaves was open to the public and that such debates could not be bought by the highest bidder. It essentially exempted broadcasters from respecting and responding to the First Amendment rights of the communities and the public they were supposed to serve.

We urge the Congress to restore the right of the ability of citizens to fully participate in the debate of issues which deeply affect their lives and communities. We urge Congress to codify the Fairness Doctrine and thereby return the airwaves to the control of their rightful owners, the American people.

Thank you for this opportunity to present testimony.

[The statement and questions and answers follow:]

Statement of Scott G. Denman, Director
Safe Energy Communication Council (SECC)

Good morning Mr. Chairman and Subcommittee members.

I am Scott G. Denman, Director of the Safe Energy Communication Council (SECC),* a coalition of ten national energy, environmental and public interest media organizations. My testimony is presented on behalf of SECC and the U.S. Public Interest Research Group (U.S. PIRG),** the national association of state PIRGS. We commend the Subcommittee for holding this hearing on the merits of the Fairness Doctrine and the need for its codification.

For eight years, SECC has assisted local and statewide environmental and consumer organizations to use the Fairness Doctrine to insure that all sides of controversial issues of public importance are adequately addressed in overall programming on radio and television. Through its network of state PIRGS, U.S. PIRG has provided Fairness Doctrine information and assistance to its members to achieve the same goal.

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*SECC is a safe energy advocacy coalition whose dual purpose is to promote sustainable, non-nuclear energy policies and to provide technical assistance to national and grassroots groups on media issues, including the Fairness Doctrine.

**USPIRG (United States Public Interest Research Group) is the national lobbying office for state-based PIRGs around the country. PIRGs are non-profit research and advocacy organizations.

Based on this hands-on experience, SECC and U.S. PIRG have found that the Fairness Doctrine, under normal and full operation, enables the public to obtain more information addressing more viewpoints than would otherwise be broadcast on controversial issues of public importance. That's exactly what it is designed to do: promote the First Amendment goal of creating a well-informed electorate.

We have also found that most broadcasters want to serve their audience and their community. The beauty of the Fairness Doctrine is that it doesn't get in the way. Rather than interfering, the Fairness Doctrine actually encourages more, and never less, coverage of the issues. This could be why a national public opinion poll commissioned by Electronic Media found that Americans support the Fairness Doctrine by virtually 2 to 1.

Our recent experience in the 1988 fall campaign cycle shows how valuable the Fairness Doctrine can be, as I will discuss later in these comments.

The Fairness Doctrine: Before the FCC's 1987 Decision

Between 1981 and the August, 1987 FCC decision to abolish most applications of the Fairness Doctrine, SECC provided -- upon request -- technical assistance on the application of the Fairness Doctrine in some 28 cases in

17 states. In only one of these instances, in what became the Meredith/Syracuse Peace Council litigation before the U.S. Court of Appeals, was it necessary for one of the groups with which we worked to file a complaint with the FCC in order to resolve the imbalance in presentation of opposing points of view.

This is a significant point. SECC's experience is that, on a day-to-day basis, the Fairness Doctrine has worked smoothly. It has encouraged citizen/broadcaster dialogue, which has the important side effect of improving subsequent coverage of issues. Our experience was that disputes, when they occurred, were invariably resolved at the local level with no involvement by government officials. This self-enforcing characteristic is an important element of the Fairness Doctrine's operation in the framework of the First Amendment. Moreover, in these cases, the Doctrine was applied without the preemption of a single moment of planned programming.

The Fairness Doctrine: After the FCC's 1987 Decision

The 1988 fall election cycle provided a unique opportunity to measure the real influence of the Fairness Doctrine. That is because the FCC has continued to administer the Doctrine as it applies to election-related matters. Although the FCC policy that it would continue

to enforce these applications was articulated in a September 22, 1987 letter from FCC Chairman Dennis Patrick to House Energy and Commerce Committee Chairman John Dingell, this policy determination was not published in the Federal Register or any FCC decision. Unfortunately, therefore, not all broadcasters were aware that the Fairness Doctrine is still in effect.

During the fall of 1988, SECC and U.S. PIRG were asked to help grassroots environmental, energy and consumer groups in Massachusetts, California, Montana, Washington and New Jersey apply the Fairness Doctrine in local and statewide referenda. In this consulting capacity, SECC and U.S. PIRG were in a unique position to analyze broadcaster response to their Fairness Doctrine obligations.

In the past, we rarely had difficulties with broadcasters with respect to the Fairness Doctrine when their programming appeared to be imbalanced with respect to controversial issues of public importance. Often this was a consequence of the sale of advertising to advocates of one side of an issue. In such cases, the local groups notified broadcasters of their concerns, and the problem was usually resolved without much difficulty.

However, in the fall of 1988, we now faced a situation where some broadcasters were unaware that the

Fairness Doctrine remains operative, and of their continuing obligation to carry opposing points of view.

Our conclusion vindicates the Fairness Doctrine. While virtually all broadcasters who knew they had a Fairness Doctrine obligation were prepared to provide time for opposing points of view, a significant proportion initially declined, until they were apprised of current FCC policy.

The differential response between those broadcasters who knew the Fairness Doctrine was in effect and those who did not, is a clear measure of the positive impact of the Fairness Doctrine. In other words, when they knew the Fairness Doctrine was in place, broadcasters carried more coverage of more points of view, without the need to file complaints.

Of 432 radio and television stations that had carried programming addressing referendum issues in the five states, SECC and U.S. PIRG found that:

o Virtually one-third (31% or 135) of the licensees did not initially realize that the Fairness Doctrine was still in existence with regard to ballot cases.

o 98% of the remaining 297 broadcasters that accepted the Fairness Doctrine's existence, immediately or sub-

sequently agreed to fulfill their obligation to provide their audiences with additional programming presenting opposing viewpoints on the ballot issues when the problem was called to their attention.

o However, in striking contrast, only 56% of the 135 stations that initially denied the Doctrine's existence eventually presented opposing points of view. This change typically followed the submission of information to persuade those broadcasters that the FCC was still enforcing the Fairness Doctrine in ballot issue cases.

o In spite of this evidence, 14% or 59 stations continued to refuse to honor their Fairness Doctrine obligation.*

o Overall, 85% of the 432 stations ultimately provided additional airtime for opposing points of view during these referenda campaigns. In cases where the broadcaster acknowledged the Doctrine's existence and his/her obligation, the Fairness Doctrine worked to better

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*Our experience tells us that, prior to August, 1987, this number would have been even lower. It is likely that some of these broadcasters may have been emboldened by a statement in FCC Chairman Patrick's letter to Chairman Dingell. Patrick stated that should the FCC be asked to review Fairness Doctrine complaints involving future ballot issues, the FCC would consider the same rationale used in its August, 1987 decision which resulted in the abolition of the Doctrine for general issue programming.

inform the public. Consequently, our democratic process was strengthened as voters were better able to make choices based on a more balanced presentation of the issues.

Our findings demonstrate the compelling need for the immediate codification of the Fairness Doctrine. The performance of those who incorrectly or initially assumed that they had no Fairness Doctrine duties -- nearly one-third of all stations -- shows the deleterious effect of repeal of the Doctrine on the public's ability to be exposed to both sides of controversial issues of public importance.

The results of this unprecedented study are simultaneously alarming and reassuring. I say "alarming" because we found that broadcasters often do not adequately present opposing points of view of controversial issues of public importance without the impetus of the Fairness Doctrine. I say "reassuring" because the study shows that a familiar and effective solution is at hand. When fully operable, the Fairness Doctrine works -- virtually without government intervention --to enrich our local communities and democratic way of life.

Prior to its repeal, the Fairness Doctrine guaranteed an environment where political discussion on the airwaves was open to the public, and that such debates

could not be bought by the highest bidder. When the FCC partially eliminated the Doctrine, it essentially exempted broadcasters from respecting and responding to the first amendment rights of the communities they were supposed to serve.

We urge the Congress to restore the right and ability of citizens to fully participate in the debate of issues which deeply affect their lives and communities. We urge Congress to codify the Fairness Doctrine and thereby return the airwaves to the control of their rightful owners: the American people. Thank you for the opportunity to present this testimony today.

The members of the Safe Energy Communication Council (SECC) are: Environmental Action Foundation; Environmental Policy Institute; Friends of the Earth; Renew America; Media Access Project; Organizing Media Project; Public Citizen's Critical Mass; Public Media Center; Sierra Club and Telecommunications Research and Action Center.

QUESTIONS OF THE CHAIRMAN

Question 1. "Mr. Denman, if a broadcaster today airs your opposition's position, what can you do to get your message out to the public?"

Answer. For the time being, the Fairness Doctrine is being enforced in election-related matters. In such cases, the Doctrine is largely self-enforcing, or easily employed to achieve reasonably balanced coverage of an issue, as is discussed in my testimony.

Outside of ballot issues, there is at present no meaningful substitute for the Fairness Doctrine. If there is money, of course, the thing to do is buy time. But broadcasters are under no obligation to sell, and many choose not to sell time, or to sell only to one side.

The sad fact is that, in the absence of the Fairness Doctrine, some broadcasters see no need to carry opposing viewpoints. Many other broadcasters, when contacted, agree to air opposing points of view on a very limited basis. But this is generally inadequate to inform the public fairly, since the response is generally far below what would be considered "reasonable" under the Fairness Doctrine.

Without money, there is little that can be done. Traditional public relations devices can help get some "free" media. Creating "news events," holding press conferences, leafletting, running print ads, putting up lawn signs and other traditional means of engaging in political dialogue are important devices, but none of them can begin to overcome imbalanced and unfair broadcast coverage. Even though letters to the editor receive much more prominent placement than their broadcast equivalent, they, too, are like squirt gun shots compared to the AK47 of broadcasting programming.

Question 2. "Mr. Denman, do you find these alternatives to be an effective way to respond to broadcast presentations on issues?"

Answer. The Fairness Doctrine has ensured that a reasonable balance of information is available to listeners, measured in frequency of presentation, audience reached as well as total time.

Unfortunately, without the affirmative duty created under the Fairness Doctrine, what many broadcasters provide does not do enough to inform their listeners on important issues. A debate on a Sunday morning panel show or a few talking head "speak out" message just before the Star Spangled Banner sign-off is hardly a counterbalance when the other side has been heavily covered during the prime or drive time. The situation is exacerbated when one side is presented in carefully produced spot announcements.

Therefore, my answer is no. By no stretch of the imagination can these methods be considered an effective alternative to reasonably balanced broadcasts of these issues of deep concern and importance to our communities. The objective of the First Amendment is a fully informed public. That's the intrinsic and simple beauty of the Fairness Doctrine. Without government intrusion, the Doctrine's existence ensures a more complete presentation of important issues through the powerful medium of broadcasting. We must accept no less because the results are essential to the maintenance of freedom and the American way: an informed electorate and a vibrant democracy.

Question 3. Mr. Denman, some small broadcasters have complained that the Fairness Doctrine creates expenses for them, requiring them to resort to lawyers and to very expensive and tedious litigation. What is your response?

Answer. I know that some broadcasters say that, but it is not true.

Our experience over the years is that the Doctrine is self-enforcing and promotes citizen-broadcaster dialogue, without lawyers ever having to get involved.

In the rare event when a lawyer is consulted, it is almost always one brief conversation to make sure that the operative principles of the Fairness Doctrine are understood. Dr. Goldoff's research confirmed that even this is an infrequent occurrence, and is hardly even a measurable cost. Legal fees for sales and talent contracts, permits and other business matters, of course, are ordinary costs of doing business and, by comparison, compliance with the Fairness Doctrine costs next to nothing.

It is important to remember that there rarely is litigation coming out of the Fairness Doctrine, and that such litigation is very inexpensive litigation. In fact, SECC has never had to file a Fairness compliant. Two years ago, the FCC told the Committee that they only wrote six letters a year even asking for a written response to a Fairness Doctrine complaint. These are one page form letters, and the response is usually just a page or two. In those extraordinary cases where a serious Fairness issue is raised—no more than a few a year—the FCC handles it with a few letters. There are no hearings, no testimony, no discovery or depositions.

Senator INOUYE. Thank you very much.
Professor Goldoff.

STATEMENT OF ANNA GOLDOFF, PROFESSOR, JOHN JAY COLLEGE, NEW YORK, NY

Ms. GOLDOFF. Good morning, Senators, and ladies and gentlemen. I am an associate professor of public administration and economics at John Jay College City University of New York, and I have been studying the Fairness Doctrine for about 17 years.

I did a research study of the Fairness Doctrine in the summer of 1987 to systematically analyze its impact on New York City's broadcasting stations. People who handle fairness in the broadcast standards departments of all three networks, general managers of the television stations and the major commercial radio stations and corporate attorneys were the key people I interviewed to find out the actual impact and implementation of Fairness Doctrine policy.

Some of the questions included were how well do broadcasters (and these are among the most sophisticated in the country) understand Fairness Doctrine policies. How many fairness complaints do the stations get? What were the procedures and processes used to incorporate fairness into station policies? How much did the FCC's Fairness Doctrine cost station management in terms of staff time, commercial time lost, etcetera? What was the impact of fairness on programming? Did it increase or decrease controversial issue programming? What were the attitudes of broadcasters towards fairness policy and the FCC? And, finally, what were the expected consequences of deregulation and elimination of the Fairness Doctrine?

To sum up, two thirds of the broadcasters gave me accurate or full and accurate definitions of the Fairness Doctrine. Most did not know that the Fairness Doctrine mandated the coverage of controversial issues. A clear majority did know that conflicting sides of controversial issues had to be broadcast. One third were vague or in error about a common definition of fairness. 36 percent confused fairness with the equal time policy.

More than half of the respondents, 55 percent, lacked a good foundation for applying fairness policies to their station or network. I found that nearly three quarters of this top level of commercial broadcasters agreed or agreed strongly with basic fairness policy. 68 percent of New York's station and network managers believed in the Fairness Doctrine while the FCC was dismantling it as a national regulatory policy. However, a great majority opposed making it into a law.

In spite of overwhelming support for fairness and its policy goals, 73 percent also favored FCC deregulation.

How can these quixotic results be explained?

New York City network executives and station managers support fairness and as a group believe it is a "part of doing business" or "good journalism." Many who supported fairness cited their roles as public trustees, that they accept government regulation in return for the granting of a license to use a scarce public resource, the airwaves. However, they fear casting the doctrine into stone by making it a law.

Almost all of the stations had heard of the FCC's fairness policies and compliance procedures. All New York City stations and networks broadcast some form of controversial public issues. 82 percent actively search out persons or groups with opposing views. 23 percent summarize broadcast material and they send it to interested groups. 82 percent practice "community ascertainment."

I also looked at the impact of the Fairness Doctrine. To sum up, 15 stations or networks said they received 0 to 1 Fairness Doctrine complaints from the public in the past year. Six stations received two to four complaints, one network received more than five.

In other words, most major commercial broadcasting stations in New York received one or no Fairness Doctrine complaints in the past 12 months. All except for one respondent in a network broadcast standards department spent less than one hour per week on fairness complaints.

The economic costs were also minimal. 91 percent said that the Fairness Doctrine cost their stations little or nothing, that it was a part of doing business. Only two broadcasters agreed with the FCC that the Fairness Doctrine had a chilling effect on controversial issue programming. A big majority, 82 percent, said that it had no effect one way or the other!

Only three network or station executives said deregulation of the doctrine would lead to the results foreseen by the FCC—i.e. the adding of controversial issue programming. 86 percent said that deregulation would have no effect on their stations or networks programming practices. In spite of overwhelming support by key decision makers in the industry for fairness policies and practices, the FCC led by an ideological zealot, "Threw the baby out with the bathwater."

The results, according to what one network vice president told me, are: I do not think market forces are good regulators of this. Anyone can print a handbill. Not everyone can open a radio or TV station. It is a scarce resource or monopoly granted by the government. We are licensed to operate in the public interest. Because not to have a fairness doctrine is to have an "unfairness" doctrine, allows the more powerful and richer elements of society to express their views while probably denying it to others.

[The statement and questions and answers follow:]

STATEMENT OF ANNA C. GOLDOFF, ASSOCIATE PROFESSOR, DEPARTMENT OF PUBLIC ADMINISTRATION, JOHN JAY COLLEGE OF CRIMINAL JUSTICE, CITY UNIVERSITY OF NEW YORK

For thirty-eight years the cornerstone of radio and television industry regulation in the United States has been the Federal Communications Commission (the "FCC") and its Fairness Doctrine policy. This policy mandated the broadcasting of controversial public issues; and once broadcast, stations had to cover all sides of a controversial issue, giving access to all legitimate opposing views (and groups).

The stated aim of the Fairness Doctrine was to promote the vigorous, democratic debate of ideas and to give minority viewpoints access to the commercial broadcast spectrum. Its aim also was to enhance the public interest and to increase controversial issue programming by broadcasters. Since 1980, however, the FCC in a climate of deregulation had moved away from full enforcement of the Doctrine, relying instead on voluntary compliance by broadcasters. In 1985 the Commission recommended dismantling the Fairness Doctrine altogether, saying that it reduced controversial issue coverage and disserved the public interest. This led in the past year to a confrontation with Congress, which strongly supported the Fairness Doctrine policy. By the end of 1987 the Fairness Doctrine was dead.

Congress, the White House, the broadcaster's lobby (the National Association of Broadcasters) and the FCC engaged in a turbulent political struggle over the fate of the Fairness Doctrine. Each faction cited conflicting and anecdotal evidence to claim contradictory results and consequences from Fairness policies. This research, conducted in

the summer of 1987, systematically analyzes the Fairness Doctrine's impact on individual broadcasting stations. New York City is the broadcast capital of America, containing the national headquarters of the three major networks (ABC, CBS, NBC), their flagship stations, and is the #1 television and radio market in the country. People who handle "Fairness" in the Broadcast Standards departments of the networks, general managers of the television stations and the major commercial radio stations, and corporate attorneys were the key personnel interviewed in this project, to find out the actual impact and implementation of Fairness Doctrine policy.[1]

This article is a case analysis, with a special focus on the implementation phase of the policy. Key questions to be included are: How well do broadcasters understand the Fairness Doctrine policies? What part of the broadcast schedule does Fairness apply (to news, public affairs, commercials or to entertainment programs)? How many Fairness complaints do the stations get? What are the procedures and processes used to incorporate Fairness into station policies? How much does the FCC's public interest regulatory policies cost station management (in terms of staff time, commercial time lost, etc.)? What is the impact of Fairness on programming? (Does it increase or decrease controversial issue programming?) What are the attitudes and beliefs of the broadcasting community toward Fairness policy and the FCC? Do they reflect the antagonism of the NAB? And finally, what are the expected consequences of deregulation, as the Fairness Doctrine is eliminated?

Deregulation and the FCC

Regulation of the broadcasting industry by the Federal Communications Commission has been cyclical in nature, mirroring the

regulatory cycles felt in the society as a whole (Gerston et al., 1988). Born as an economic regulatory agency, the FCC got involved in social activism in the 1960's and 1970's, most notably in the Banzhaf case where the Commission tried to promote the public health by requiring the airing of anti-smoking public service announcements (psa's). A counter-revolution provoked by broadcasting industry resistance and the Reagan administration appointment of Chairman Mark Fowler resulted in a period of "deregulation" and "self-regulation" of the industry.

Chairman Fowler was an exponent, not really of regulatory reform, but of dismantling the Commission's regulatory apparatus. He "believed that self-regulation would make the industry more efficient and responsive to the public will" (Gerston et al., 1988: 234). In The Deregulated Society the authors go on to say that the FCC is signalling a new "... aggressive laissez-faire attitude toward business activity" (Gerston et al., 1988: 234). The individual consumer and the marketplace would determine the public interest, not the government. One of Fowler's chief targets for this dismantling was the Fairness Doctrine.

The Significance of Impact

Policy analysis involves the description, evaluation and improvement of public policies. Implementation is an important and much neglected component of the policy-making and policy-applying process (Bernstein, 1955; Pressman and Wildavsky, 1973; Van Meter and Van Horn, 1975; Coombs, 1980; and Edwards, 1980).

Although policy compliance has been virtually ignored by scholars in the field in favor of studying the history and policies of regulatory commissions, their legal procedures, and the commissioners who have

influenced regulation, it is a key element in determining the impact of a regulatory decision (Bernstein, 1955).

Policy analysts agree that "Implementation is deceptively simple... the difficulty of the task has discouraged detailed study of the processes of policy implementation" (Van Meter and Van Horn, 1975: 450). A policy case study now of the Fairness Doctrine helps to make recommendations for broadcasting industry reregulation, after an era of deregulation and changing notions of the public interest.

The Fairness Doctrine

In 1934 the Congress set up the Federal Communications Commission (the FCC) and charged it with regulating the broadcasting industry in "the public interest, convenience and necessity."[2] The Fairness Doctrine was an FCC policy implementing that statute's public interest clause. Under this Doctrine, stations which treated controversial public issues had to provide time to all legitimate opposing views.[3] The aim of the Fairness Doctrine was to complement the First Amendment. In an unpublished Primer written by the FCC staff in 1981 it stated:

> ...the policy of the First Amendment to foster 'robust, wide-open debate' ... certainly permits the analysis of any spokesman to be one-sided. What is required, under the Fairness Doctrine, is not that he be censored but that the other side be given the opportunity to present its viewpoint.[4]

In that same Primer the Commission defined the policy as having two parts:

> The Fairness Doctrine requires a station (i) to broadcast discussion of the most important issues of public importance in its coverage area; and (ii) to try to bring about the presentation of conflicting views on these issues.[5]
>
> The broadcaster need not give the same amount of time to each side of an issue as he would in granting 'equal opportunities' to political candi-

> dates. All it need do is to encourage the presentation of, and provide reasonable opportunity for, different views on the issue in the overall programming of the station.[6]

The Supreme Court in 1969 in Red Lion Broadcasting Co. v. FCC[7] unanimously upheld the Fairness Doctrine policy, pointing out its central importance to a democratic society and the free flow of ideas. The Court held that the rights of the viewing public to hear contrasting viewpoints on issues of public importance, not the private economic rights of broadcasters were paramount.[8] Red Lion said that broadcasters, who receive a valuable public resource for free, become public trustees and must present diverse viewpoints on public issues. This concept is the core of the Communications Act's public interest standard.

The Fairness Doctrine was first explicitly spelled out by the FCC in its 1949 Editorializing Report[9], and reaffirmed in 1974 in its Fairness Report.[10] By 1981, however, in a climate of deregulation and under Chairman Mark S. Fowler the Commission recommended to Congress that the Fairness Doctrine be repealed.[11] In 1985 it issued a voluminous report entitled "General Fairness Doctrine Obligations of Broadcast Licensees."[12] Chairman Fowler and the Commission now claimed that "in stark contravention of its purposes...the Fairness Doctrine, in operation, inhibited the presentation of controversial issues of public importance...As a consequence, the Commission concluded that the Fairness Doctrine as a matter of policy disserves the public interest."[13] However, instead of directly repealing the Doctrine the FCC asked Congress to consider the issue. It deferred to Congress because the Commission felt that a 1959 amendment to the Communications Act had implicitly codified the Doctrine and thus it would be up to

Congress to dismantle it. Congress reacted strongly to this attempt to deregulate broadcasting's public interest standard. On June 4th it passed the Fairness in Broadcasting Act of 1987, incorporating both "prongs" or parts of the Fairness Doctrine explicitly into law. President Reagan vetoed the act on June 20, 1987. By August the Commission had ruled unanimously to abolish the Doctrine, on the grounds that the policy restricted the First Amendment rights of broadcasters.

The Senate Report on the Fairness in Broadcasting Act of 1987[14] rejected the FCC's 1985 treatment of the Fairness Doctrine. It found that the FCC's factual evidence and legal analysis were flawed. The Senate Committee Report said that the FCC had relied on "anecdotal" evidence[15] to show that the Fairness Doctrine had been used by public interest groups to intimidate broadcasters and to take controversial issues off the air. In fact, the Senate alleged that the Fowler-dominated Commission had already unofficially repealed the Fairness Doctrine on its own. In the period 1984-1986 the FCC received 19,000+ Fairness complaints from the public. In only 18 cases in that three year period had the FCC forwarded a Fairness complaint to the licensee. See Table 1. In fact the Senate stated "During the six years that Mark Fowler has been Chairman of the Commission, only one Fairness Doctrine complaint has resulted in litigation."[16]

In short, the Senate (and Congress as a whole) rejected the FCC's cost-benefit, constitutional and anecdotal arguments versus the Fairness Doctrine. It concluded that "The debate on the Fairness Doctrine is, at its roots, a debate over government control over a public resource, the spectrum."[17] Rejecting the Commission's claims that Fairness policy is an overwhelming economic burden on both broadcasters and the regulatory

agency itself, the Senate said that "many of these complaints require no more than the cost of a stamp or a phone call to resolve."[18] It felt that the Fairness Doctrine permitted public access to broadcast stations and gave the public a greater range of controversial issues and views.[19]

Theories of Regulation and Deregulation

"To deregulate...means more than the reversal of government obligations--it means the adoption of new values...deregulation refers to the wholesale rearrangement of the connections that bind the public, the private sector, and government institutions (Gerston et al., 1988: vii). Derthick and Quirk portray "deregulation" as an economic regulatory reform that went through several stages. Starting out as "analytic prescription," it evolved into a notion of both "policy choice" and "political symbol." Deregulation in their words then finally became a "policy fashion" or fad (1985: 35-53).

Gerston, Fraleigh and Schwab sum up the consensus of scholars in the field on theories of regulation. These include "public-interest theory," government as "guarantor of the public good" (1988: 66). "Capture theory holds that regulation serves the interest of the regulated..." (1988: 69). "Bureaucratic theory" is

> Another way to explain regulatory activity is by examining regulation as an independent variable. This approach departs from the two theories already presented. With respect to public-interest theory, a normative claim for regulatory agencies attempts to be responsive to the public will; in the case of capture theory, agencies respond to the demands of vested interests.
>
> Bureaucratic theory sees the sequence of events and outcomes as occurring in reverse. Specifically, the flow of power begins inside the regulatory bodies... 'organizations create authority rights.' With this framework as a source of legitimate activity, agencies create rules for others to obey (1988: 72).

"Economic theories" are a fourth category, assessing the effective-

ness of regulation through the use of standard economic assumptions and cost-benefit analysis (1988: 75).

A Conceptual Approach to Implementation

The recent controversy over the Fairness Doctrine is a political case study of the politics of regulation and deregulation. Powerful forces are struggling over the Doctrine, each side claiming that it produces contradictory results. The aim here is to determine the empirical effects of the Fairness Doctrine on individual broadcasting stations. Many implementation studies are discrete case studies, focusing on one aspect of a policy, providing much descriptive detail in the process (Edwards, 1980:7). This study, instead, operationalizes a conceptual approach to policy implementation (Van Meter and Van Horn, 1975).

As we have noted, various models have been proposed to explain the regulatory policy process. One other approach that has long-standing confirmation in the literature is that of Robert S. Lane (1966). In his study The Regulation of Businessmen he looks at the social conditions of government regulatory control, at the social, psychological and personal conditions of compliance and noncompliance with regulatory policies. His emphasis is on the way mores and belief systems affect social relations between businessmen and regulators. He concludes: "The economic cost of regulation has been an important consideration...but the cost in status, in conceptions of the self, in freedom to make certain traditional decisions... --these psychic costs were burdensome to the nation's business management." (Lane, 1966:35). Much of the literature on the impact of court and other administrative decisions confirms Lane's findings. Internal psychological forces and clientele

attitudes are found to be the most important factors determining policy compliance or noncompliance (Johnson, 1967; Levine, 1969; Birkby, 1969).

Van Meter and Van Horn (1975) link policy impact and implementation in the following way:

> A clear distinction is made between policy implementation, performance, and what has generally been referred to as policy impact. These are distinct though not unrelated concepts. The study of impact searches for the consequences of a policy decision...By focusing on those activities that affect the rendering of public service (i.e., performance), the study of policy implementation highlights one of the forces that determines policy impact. Hence, as Dolbeare (1974) observes, impact studies typically ask 'What happened?' whereas implementation studies ask 'Why did it happen this way?' (Van Meter and Van Horn, 1975:448).

This study is a policy analysis that stresses the implementation aspect of that process.

Following Lane (1966) and others in the field Van Meter and Van Horn in their model emphasize the crucial role played by the "dispositions of the implementors" in the policy-obeying process: "Three elements of the implementors' response may affect their ability and willingness to carry out the policy: their cognition (comprehension, understanding) of the policy, the direction of their response to it (acceptance, neutrality, rejection), and the intensity of that response" (1975:472). In addition to these attitudinal factors objective standards of compliance ("policy standards and objectives") have to be evaluated. Pressman and Wildavsky (1973:xiv) note the study of implementation requires that goals and objectives be identified and measured since "implementation cannot succeed or fail without a goal against which to judge it." In this study the Fairness Primer and other

FCC cases and documents are incorporated into the policy evaluation here.

The Research Design

The model was operationalized via a key person questionnaire with 40 items. Personal interviews were conducted with the general managers of the six commercial television stations and the sixteen major commercial radio stations in New York City.[20] The questionnaire, following Van Meter and Van Horn focused on three areas: 1) clientele understanding of the Fairness Doctrine; 2) clientele attitudes toward Fairness policies--acceptance, neutrality or rejection and 3) station compliance with FCC Fairness policy standards and objectives as spelled out in key Commission cases and the 1981 Fairness Doctrine Primer.

Of the television and radio stations included in the study, fifteen were network, network "o/o" or affiliates. Seven were independents or "new" network stations (Fox Broadcasting), reflecting the dominance of the networks in the New York market. Twenty of the stations had large audiences, two had narrower audience bases. Two were black-oriented stations, eight were general audience, five were music stations and three had primarily news/talk formats. The rest had mixed formats. Six respondents represented small stations, nine represented medium-sized stations and seven respondents represented large "flagship" stations (i.e., WABC-TV) and networks. This latter group is significant in that the policies and preferences of the elite group interviewed have consequences far beyond the broadcast stations located in New York. Because of the centralized nature of network Broadcast Standards departments, the respondents interviewed set the Fairness policies and practices not only for their New York City stations but for the network

"o/o" TV and radio stations and affiliates around the country. (See footnote 1)

Understanding and Comprehension of the Fairness Doctrine

Q. 7 Could you, as best you can summarize for me in your own words the FCC's Fairness Doctrine policy?

Two-thirds of the broadcasters queried gave accurate or full and accurate definitions of the Fairness Doctrine. Most did not know that the Fairness Doctrine mandates the coverage of controversial issues. A clear majority did know that conflicting sides of controversial issues had to be broadcast. One-third of the respondents were vague or in error about a common definition of Fairness.

Q. 11 I am going to give you a series of hypotheticals. Could you tell me whether the Fairness Doctrine obligations of the station are triggered in that case? (The hypotheticals were summaries of actual FCC cases. Four triggered the Fairness Doctrine, one did not. That case involved "equal time.")

Sixty-four percent of the broadcasters received a good score (4-5 right) on the question. Thirty-six percent got two or more hypotheticals wrong. Thirty-six percent also confused Fairness with the equal time policy that governs political candidates, not controversial issues.

Q. 8 To the best of your knowledge, does the Fairness Doctrine apply to news programs and public affairs programs?

Q. 9.... to commercials?

Q. 10.... to entertainment programs?

Broadcasters fared less well on these questions. Only forty-five percent knew that the Fairness Doctrine applied to the total broadcast day. Over one-third didn't know that Fairness applied to public affairs

programs. Eighteen percent didn't know that it applied to product commercials. Fifty percent didn't know that it applied to entertainment programs. In all, forty-one percent received poor scores on the application of Fairness policies.

Only ten out of twenty-two (45%) of these sophisticated respondents were judged to have a good general understanding of Fairness issues, policies and practices. More than half of the respondents (55%) lacked a good foundation for applying Fairness policies at their station or network.

Broadcaster Attitudes

Q. 12 As you know, the Fairness Doctrine requires a station to broadcast discussion of the issues of public importance in its coverage area and to bring about the presentation of conflicting views on these issues. Do you agree with this policy or not?

Q. 16 Do you believe in the Fairness Doctrine and its policy goals?

Q. 18 Legislation is pending in Congress now to put the Fairness Doctrine into law. Do you support or oppose the Fairness in Broadcasting Act of 1987?

Nearly 3/4 of this top level of commerical broadcasters agreed or agreed strongly with basic Fairness policy. Sixty-eight percent of New York City station and network managers still believed in the Fairness Doctrine while their lobby in Washington (the NAB) and the FCC were dismantling it as a national regulatory policy. However, a great majority opposed making it into a law. Only four broadcasters supported that legislation.

Q. 14 Do you agree that at your station the FCC has the legitimate authority to mandate the broadcasting of controversial public issues?

Broadcasters as a group were almost evenly split on their attitudes towards the FCC's regulatory authority. Fifty-five percent believed that the FCC has the right to regulate them, forty-five percent said not.

Q. 31 Does your station support or oppose the current FCC effort to dismantle the Fairness Doctrine?

In spite of overwhelming support for Fairness and its policy goals, seventy-three percent also favored FCC deregulation of the policy. How can these quixotic results be explained? New York City network executives and station managers support Fairness and as a group believe it is a "part of doing business" or good journalism. Many who supported Fairness and believed in regulation cited their role as public trustees, that they accept government regulation in return for the granting of a license to use a scarce public resource (the airwaves). However, they feared casting the Doctrine "into stone" by making it into a law. Many of those who rejected the FCC's authority were in favor of total Fairness deregulation. They felt that broadcasters could apply Fairness better without government interference. Most in this group strongly favored the laissez-faire policies of the present administration and former FCC Chairman Mark Fowler.

Policy Standards and Objectives

Q. 20 The FCC set out a procedural process in 1981 for stations to follow to comply with the Fairness Doctrine. It includes broadcasting controversial issues; searching out for responsible persons and groups that hold opposing views; and sending them a copy of material already broadcast on that issue. Have you ever heard of this policy?

Eighty-two percent, a big majority had heard of the FCC's Fairness policies and compliance procedures. All New York City stations and networks broadcast some form of controversial public issues. Eighty-two percent actively search out persons or groups with opposing views. Twenty-three percent summarize broadcast material and send it to interested groups. Eighty-two percent practice "community ascertainment," consulting community leaders to find appropriate spokespersons. Fifty-nine percent add labels to editorials asking for responsible spokespersons to reply. Only three stations in New York City admitted to non-complying with FCC compliance procedures. Two of them had never heard of the policies.

The Impact of the Fairness Doctrine

Q. 23 How many Fairness Doctrine complaints did your station receive in the past year?

Fifteen stations or networks said that they receivec 0-1 Fairness Doctrine complaints from the public in the past year. Six stations received 2-4 complaints, one station or network received more than 5. Most New York City major commercial broadcasting stations received one or no Fairness Doctrine complaints during the past twelve months.

Q. 28 On the average, how much time do you and your staff spend on Fairness Doctrine complaints?

Q. 29 Could you judge for me how much the economic cost of the Fairness Doctrine, in staff time and commercial time lost, is borne by your station?

All except for one respondent (in a network Broadcast Standards Department) spent less than one hour per week on Fairness Doctrine complaints. The ecoromic costs of the Fairness Doctrine were also

minimal. Most station management answered "none," "minimal" or "negligible" to Q. 29. Only two stations mentioned the high potential costs of Fairness Doctrine complaints. Ninety-one percent said that the Fairness Doctrine cost their stations little or nothing, that it was a "part of doing business."

Q. 33 Does the Fairness Doctrine increase or decrease the controversial issue programming broadcast on your station?

Only two broadcasters agreed with the FCC, that the Fairness Doctrine has a "chilling effect" on controversial issue programming. A big majority (82%) of respondents said that it had no effect one way or the other!

Q. 38 There is a possibility that the Fairness Doctrine will be eliminated. How would this affect your station's programming practices?

Only three network or station executives said deregulation of the Fairness Doctrine would lead to the results foreseen by the FCC -- i.e., the adding of controversial issue programming. Eighty-six percent said that deregulation would have no effect on their station's or network's programming practices.

New York's major commercial broadcasters said that the Fairness Doctrine had a negligible impact on their station's time, costs and programming decisions. They incorporate Fairness policies and procedures as a matter of good journalistic practice.

Conclusions

The Fairness Doctrine as a public policy mandated the broadcasting of controversial public issues; gave minority viewpoints access to the commercial spectrum; and required that public affairs be covered fairly (that all sides of an issue be heard). These are important public

interest values, essential to an informed citizenry and fair access to a scarce technological resource, the commercial broadcasting spectrum. The Fairness Doctrine, while imperfectly understood by its clientele group, has been pretty well implemented by the top level of the broadcasting industry. The national networks and the major New York commercial television and radio stations have incorporated Fairness compliance standards and objectives into their normal channels of covering news and public affairs. Community ascertainment and search devices to utilize opposing viewpoints and groups are part of standard journalistic practice. Covering a controversial issue "fairly" is considered good journalism. Negative costs incurred as the result of the Fairness Doctrine have been minimal.

In spite of overwhelming support by key decision-makers in the industry for Fairness policies and practices the FCC, the present administration, and the NAB have fought hard to do away with the Doctrine. Instead of doing a case by case cost/benefit analysis of individual broadcast regulations, their impacts and consequences, ideological zealots within the Commission have thrown "the baby out with the bathwater."

The results for the public interest regulation of broadcasting were summed up by what one network Vice-President told me:

> I don't think market forces are good regulators of this. Anyone can print a handbill. Not everyone can open a radio or TV station. It is a scarce resource or monopoly granted by the government. We're licensed to operate in the public interest...
>
> Because not to have a Fairness Doctrine is to have an "unfairness" doctrine... allows the more powerful and richer elements of society to express their views, while probably denying it to others. [21]

NOTES

1. People interviewed in this study included the general managers of the major commercial radio and television stations located in New York City. In addition key personnel with leverage over network owned and operated ("o & o") and affiliated stations nationwide were included. These were the attorney who handles Fairness for the six Fox stations; the general manager of the only black "news/talk" station in New York City; the person who handles Fairness policy for the entire ABC television network; the general counsel for NBC's five "o & o" TV stations, the Director of Operations for the ABC television network; the Vice-President of Program Practices for the CBS Broadcast Group and the attorney for the four NBC networks and eight radio stations. Each interview was conducted personally by the principal investigator during 1987.

2. 47 U.S.C. 1934 sections 307 c and d, and 309 a.

3. FCC Report on Editorializing, 13 FCC 1246 (1949).

4. The Fairness Doctrine - How it applies to Broadcasting and Cablecasting ("The Fairness Primer") 1981 found in Appendix 2 of the Fairness in Broadcasting Act of 1987, p. 128.

5. Ibid. The Commission goes on to say "It is the broadcaster who decides what issues are most important in its area. The FCC will not intervene in this or any other of the licensee's Fairness Doctrine decisions unless there is evidence that it acted unreasonably or in bad faith." Traditionally the FCC leaves this "first prong" of the Doctrine up to the judgement of the broadcaster. Most cases that come up to the Commission involve the "second prong," after a controversial issue has been broadcast.

6. Ibid.

7. 395 U.S. 367 (1969).

8. Ibid. at 390.

9. Op. cit. fn 3.

10. Fairness Doctrine and Public Interest Standards ("Fairness Report"), 48 FCC 2d (1974).

11. FCC News Release Report No. 5068, Sept. 17, 1981.

12. General Docket No. 84-282; FCC 85-459 (August 7, 1985). Reproduced in the Federal Register Vol. 50, No. 169 Friday, August 30, 1985, pp. 35418-35455.

13. Ibid., p. 35418. (Pagination refers to the Federal Register.)

14. Fairness in Broadcasting Act of 1987 Report #100 - 34 of the Senate Committee on Commerce, Science and Transportation on S. 742 (April 3, 1987) 100th Congress, 1st session.

15. Ibid., p. 28.

16. Ibic., p. 5. This case is Meredith Corp. v. FCC, 809 F. 2d 863 (D.C. Cir. 1987).

17. Ibid., p. 32.

18. Ibid., p. 29.

19. Ibid., p. 4.

20. The TV stations contacted were: WCBS, WNBC, WNYW, WABC, WWOR, WPIX. All are broadcast from New York except WWOR (located in Secaucus, New Jersey). There are 43 radio stations that make the "ratings charts" in the metropolitan area (Arbitron rating service). According to Broadcasting Magazine's radio editor about 20 can be considered "major commercial stations," defined according to ratings and transmitter size. After the 20th largest station they receive only 1.5 or very splintered market shares. The 18 stations included in this study were: WHTZ FM, WRKS FM, WPLJ FM, WINS AM, WOR AM, WPAT FM, WBLS FM, WLTW FM, WNEW FM, WCBS AM AND FM, WNBC AM, WYNY FM, WXRK FM, WQHT FM, WABC AM, WNEW AM and WFAN AM. WHTZ and WPAT declined requests for interviews.

21. Personal interview at the American Broadcasting Co., August 5, 1987 in New York City.

TABLE 1

Year	Complaints Filed	Complaints Forwarded to Licensee
1984	6,760	6
1985	7,296	6
1986	5,509	6

Table found in Letter to Senator Inouye from Chairman Mark Fowler, March 20, 1987.

QUESTIONS OF THE CHAIRMAN

Question 1. Professor Goldoff, are you aware of any other surveys of broadcast stations in the last two years concerning the Fairness Doctrine?

Answer. Senator Hollings, I was made aware of a survey conducted by Young & Rubican Advertising Agency in New York of American broadcasting stations, dealing with the effects of deregulation of commercial advertising time limits. But this survey was conducted about four years ago. Young & Rubican told me that over 800 stations responded by saying that they would not change their policies on commercial minutes, even if they were deregulated.

Question 2. Would it have assisted public interest groups and stations if the FCC published guidelines or a handbook providing practical examples of how the Fairness Doctrine actually works?

Answer. As to your next question, this comes to the heart of this hearing. As I answered previously to Senator Inouye, I recommend most highly the sending of a clear primer on the Fairness Doctrine to the broadcasters and any other interested parties. Clear communications between a regulatory agency and its clientele would vastly improve voluntary compliance with an informal policy like the Fairness Doctrine.

But I think another important issue is at stake here. As you know, and as former Chairman Fowler's letter (of March 20, 1987) to Senator Inouye attests, the FCC stopped enforcing the Fairness Doctrine long ago. From 1984–1986 the FCC received 19,000+ Fairness complaints from the public. In only 18 cases in that three year time period did the FCC even forward a Fairness complaint to the licensee. So equally as important as clear policy guidelines are FCC Commissioners who are interested in protecting the public's interest in the commercial broadcasting system. Almost 2/3 of the viewing audience still belongs to the networks. (This is down from 80–90% of a few years ago). A revived Fairness Doctrine and concomitant legislation will not alone protect access to a broadcast spectrum without commissioners who are interested in serving the public interest.

To sum up, we need the 1989 Fairness in Broadcasting Act. But we also need political appointees who will take a more balanced view of broadcast regulation, who don't regard "regulation" as a political dirty word.

One final note. It should also be stressed or heavily reiterated in any Fairness Primer or handbook that the Fairness Doctrine does not involve "blackmail" of television and radio stations. That Fairness does not give any one individual or group particular access to a particular station. That it is up to the broadcaster to choose both controversial issue and public affairs programming and format. The Fairness Doctrine mandates only the coverage of *some* controversial issues of public importance and ask the individual station to balance its coverage in its overall broadcast programming.

Senator INOUYE. Thank you very much, Professor. I would like to begin the questioning with Dean Krattenmaker.

There is nothing in our communication act that would preclude or prohibit the sharing of a frequency. I believe that is correct?

Mr. KRATTENMAKER. I think that is right.

Senator INOUYE. In fact, it is common practice, especially among noncommercial licensees. They share 12 hours each.

Now, what if we licensed broadcasters to operate only for 23 hours a day and set aside one hour for the public to discuss anything they wanted. In your opinion, would that violate the broadcasters First Amendment rights?

Mr. KRATTENMAKER. I think it probably would not. I think you could probably do that. I have a lot of question about it as a regulatory policy, but I think you could probably do that.

Senator INOUYE. What do you think about it, Professor Baron?

Mr. BARRON. Well, basically what you are doing when you do that is you take a common carrier function for part of the day. That is basically the idea. Attempts in the past, proposals in the past to do that have been challenged on the idea that in the Communications Act the broadcasting function and the common carrier function are supposed to be separate. If you try to combine them

(as the act is presently written), there is some law to the effect that it is impermissible. Of course, if the Congress made it clear, it would not be a problem.

I agree with Tom Krattenmaker that as a policy, it would not be very effective policy. I would not myself trade fairness for that kind of very limited access.

Senator INOUYE. Is there an alternative approach we can take to carry out the goals of the Fairness Doctrine?

Mr. BARRON. My own view is that the Fairness Doctrine worked when it was enforced of course, it has not been enforced as I am sure many on this committee know, for many years. But when it was enforced, I think it worked fairly well. I was very interested in Professor Goldoff's testimony in that regard.

It has never been understood that the Fairness Doctrine required that if somebody says X, you would have to say anti-X. The idea is over the broad spectrum of programming over a licensee's period of license, the licensee must provide general balanced presentation, but not as to every issue. And I think given that understanding, the Fairness Doctrine works fairly well. I do not see a substitute for it.

One thing that I think is very important to emphasize, and I see that the bill provides, that the Fairness Doctrine should be enforced as of that date in 1987. Well, as of that date it was always misunderstood that for purposes of Fairness Doctrine compliance, the broadcaster is a trustee. The broadcaster picks, selects the programming. If the broadcaster think there has been too much on issue X and that there ought to be some opportunity for anti-X, the spokesman for that opposing view is selected by the broadcaster. This gives a great deal of deference to broadcast journalism. And I think that is very desirable.

Senator INOUYE. Dean, is there any alternative approach to carrying out the goals of the doctrine?

Mr. KRATTENMAKER. Very much so, Mr. Chairman. I hope in my prefatory remarks I was not misunderstood as saying that I am somehow in favor of monopolistic or unfair speech. The alternative is to make it possible for more broadcasters to enter markets, broadcasters who want to reach people who would like to hear what they have to say.

Now, the FCC has made great strides in that respect, and it has been some time since I have looked at the FCC's regulatory policy agenda. But some obvious examples that come to mind are that there are still roadblocks on the way to people opening cable systems in various communities. When the Commission decided that it was going to authorize low-power television, it decided it would spend all its time on the smallest communities; that is, the fewest viewers. There are still many entry barriers in this industry that have the effect of creating fewer voices than might possibly be available for listeners and viewers to select among and thereby to force without any expenditure of government money, without any government censorship, without any bureaucrats writing rules in the Code of Federal Regulations to enforce a fairness doctrine directly on broadcasters by turning the off/on dial and the station frequency switch.

Senator INOUYE. Professor Barron, have any stations lost their license as a result of violating this doctrine?

Mr. BARRON. There was one case probably seventeen years or so back, the *Brandywine-Main Line Radio* case (*Brandywine-Main Line Radio, Inc. v. FCC,* 473 F2d16 (D.C. Cir. 1972), involving the Reverend Carl McIntyre—where you can interpret the case to stand for the proposition that because of Fairness Doctrine noncompliance, the license was lost. But it is not terribly clear because that licensee also was found to have misrepresented to the Commission.

And if you look at the Court of Appeals decision in the case, it appears that one of the bases of decision was misrepresentation. But certainly noncompliance with the Fairness Doctrine was also a major factor in the *Brandywine* case. So, let us say that that one case is an example.

Senator INOUYE. Mr. Denman, you have heard Professor Goldoff. In her prepared testimony she says that 82 percent of the broadcasters in New York City search out persons or groups with opposing viewpoints when they present a controversial issue. Do you agree with this?

Mr. DENMAN. My experience over the last eight years is that I would agree in terms of news and public affairs programming. In other words, the working journalists will normally actively seek out a variety of viewpoints on a given topic. It makes for good journalism. It informs the listenership and the viewership.

I would say emphatically no when the controversial issue is presented by paid advertising. And therein lies the problem. It is a matter of frequency when an issue of public importance is discussed vis-a-vis paid advertising by only one side. It presents a serious imbalance in terms of the reasonable presentation of all sides of controversial issues. And our experience is that very few broadcasters will actively take the affirmative duty to go out and seek opposing points of view when it is involved with commercial airtime.

Senator INOUYE. Do you believe that broadcast stations really understand the Fairness Doctrine? Listening to Professor Goldoff, one would get the impression that very few people are really aware of it.

Mr. DENMAN. In our experience, the Fairness Doctrine is not well understood by broadcasters, and I think the blame for that has to be laid squarely at the feet of the FCC for both intentionally and otherwise, not informing the public or the broadcasters about the responsibility.

A good case of this is what happened after the 1987 decision regarding general issue matters, and that was when Chairman Patrick responded to a letter to House Energy and Commerce Committee Chairman Dingell regarding the specifics of that decision.

In that letter he indicated that indeed the Fairness Doctrine was still applicable to ballot issues. Well, that decision, that policy of the FCC was not discussed in the Federal Register; it was not discussed in any other publicized decision by the FCC. It left broadcasters totally in the lurch so that when they were dealing with referendum issues, they were in some cases under the misunder-

standing that the Fairness Doctrine no longer applied. So, it caused great confusion.

As a matter of fact, that is the title of our report and our study, "Widespread Confusion". Widespread confusion is what we found.

Senator INOUYE. Professor Goldoff, you have said it is not enough for 17 years?

Ms. GOLDOFF. On and off. I did my dissertation on it.

Senator INOUYE. What can the FCC or the Congress do to better advise/inform broadcasters on the purpose and the goal of the doctrine?

Ms. GOLDOFF. Well, I think that the 1981 primer was a good start. It made a lot of sense. It was clear, it was analytical, it gave examples. And if you read it carefully just once, you would understand the Fairness Doctrine.

I think the problem was the FCC did not send the primer to the broadcasters. I think in regulatory literature one of the key ideas is that compliance on the part of the clientele increases if they get clear communications from the regulating agency. But I think there was a consistent decision not to send the primer to the broadcasting community.

So, I think I agree with Scott in that the blame has to rest with the FCC. I think if they were clearer and communicated more clearly with their clientele, it would help matters greatly.

Senator INOUYE. Thank you very much. I had assumed that the primer was sent to all broadcasters.

Ms. GOLDOFF. No, it was not.

Senator INOUYE. Senator Packwood.

Senator PACKWOOD. Professor Barron, are you the Jerome A. Barron of Syracuse, New York that was a lead attorney on the Tornillo case?

Mr. BARRON. That is right.

Senator PACKWOOD. Do you still believe in that case?

Mr. BARRON. I do. I believe in the side that lost.

Senator PACKWOOD. That case was about a Florida statute.

Senator STEVENS. The side that lost?

Mr. BARRON. I was the lawyer for Pat Tornillo. He was suing the Miami Herald.

Senator PACKWOOD. In that case, the Florida legislature had passed in essence an equal space statute.

Mr. BARRON. That is incorrect.

Senator PACKWOOD. What did they pass?

Mr. BARRON. In the first decade of this century the Florida legislature passed as part of the Florida electoral code, dealing with its famous government in the sunshine a statute that said that if you—if a newspaper attacked a candidate, the candidate would have equivalent space to respond. And the theory was that the electorate should have information to go to the ballot box. So, it was a limited right of reply statute. And, as construed by the Florida Supreme Court, the statute was limited to editorial attacks.

So, it was not an equal space for any kind of issue, but only for an attack in an editorial on a candidate just prior to election.

Senator PACKWOOD. I will stand corrected. As I recall, the Miami Herald published editorials very critical of Tornillo.

Mr. BARRON. That is correct.

Senator PACKWOOD. He wanted under the statute the right to reply.

Mr. BARRON. That is correct.

Senator PACKWOOD. And that case went to the Florida Supreme Court. They upheld the Florida statute.

Mr. BARRON. I argued in the Florida Supreme Court, and we won there six to one.

Senator PACKWOOD. It went to the U.S. Supreme Court?

Mr. BARRON. And we lost nine to nothing.

Senator PACKWOOD. But you support the theory of the Florida Supreme Court?

Mr. BARRON. I do indeed.

Senator PACKWOOD. That even under the First Amendment you can impose some kind of content restrictions on newspapers.

Mr. BARRON. That is right.

Senator PACKWOOD. Why do you think so?

Mr. BARRON. Because I think in the age in which we live that it is a public relations triumph for the media industry to pass off as the implementation of First Amendment freedom that only they can control what is in a debate.

When we have in most American cities only one newspaper, when we have in most American cities only one ownership controlling the most important VHF television network affiliate and that newspaper—I am answering your question, Senator—it seems to me that the access to the forum is extremely limited. We have to open up the media if the First Amendment is going to mean anything to ordinary people, and increasingly it does not.

Senator PACKWOOD. Now, at the time the country was founded, we had only eight daily newspapers.

Mr. BARRON. But if you look back at the situation at that time, what you had, though, is a great abundance of weeklies in Charleston and Philadelphia and Boston, and New York. Usually the printer would also put out a weekly. In places like Boston and Philadelphia there were something like 30 and 40 weeklies where a great deal of the debate of the time took place. And we have no analog to that today.

So, I think that we are in a completely different age. It is very important that the media remain free from government control. But I think some limited opportunities for response are not inconsistent with journalistic freedom and would, I think, do a great deal to enhance political debate.

Senator PACKWOOD. Under your theory, could the federal government impose a fairness doctrine on newspapers?

Mr. BARRON. I would be opposed to that.

Senator PACKWOOD. And why is that?

Mr. BARRON. Because I think we are dealing with a scarce resource in broadcasting. But with newspaper, there is economic scarcity but not technological scarcity. Also, we are dealing with——

Senator PACKWOOD. Do you think in Miami that broadcast properties, radio broadcast properties are scarcer than newspaper properties?

Mr. BARRON. They are not technologically scarce. In other words, there is an economic scarcity that prevents the entrance of competition to the "Miami Herald."

Senator PACKWOOD. That is correct.

Mr. BARRON. But there is not technological scarcity. That is the distinction I am making. Let me say that for my own view, I think economic scarcity is a problem as well. But I think we are dealing with different First Amendment traditions. And the tradition of licensing is a tradition that I think is inconsistent with our typical ways of dealing with the press.

The way we deal with press accountability is found in something like the law of libel, which we do through the courts. And that is why in my analysis of how to make the press more accountable, I think the courts should also be used to implement a right of reply.

Senator PACKWOOD. Well, I am confused by your rationale. You support the right of reply in Florida and you used the element of scarcity.

Mr. BARRON. There is an argument of economic scarcity, but I do not think that the solution is to put the press under a federal commission. You would like me to support that. Then it would be even less attractive than it is now. I do not support it because the newspaper press functions in an entirely different tradition.

We have always handled print media problems through the courts, and I respect that tradition and would continue to handle those problems there.

Senator PACKWOOD. I am not going to quarrel with you about courts versus the FCC. I am trying to figure out what limits you have in your own mind as to where you would draw the line as to what content requirements could be placed on a newspaper by a state legislature in that case.

Mr. BARRON. I do not look at it exactly the way you do as a content restriction. If a newspaper attacks someone in an editorial, it seems to me that if that person attacked has an opportunity to respond, I do not see that as a content restriction because the editorial can still take place. If the editorial is published, what happens is now, however, the other person instead of being silenced has an opportunity to respond. I found that hard to look at that as content restriction.

Senator PACKWOOD. If you had, then, a major ballot issue in Miami and the proponents, about $700,000 of newspaper space, should the paper have to give away some space to the other side?

Mr. BARRON. Do you want to repeat that question?

Senator PACKWOOD. You have a ballot issue going in Miami. It does not matter what issue it is. The proponents have a lot of money, and they buy $700,000 over three or four months' worth of space in the "Miami Herald." The opposing side has relatively little money. Should they be allowed to have response space?

Mr. BARRON. No, because I think that there is a great difference between the "Miami Herald" situation and that situation. The newspaper has voluntarily chosen to enter the vortex of debate. In other words, it has decided to say in its editorial page—we are not talking about advertising space—but it has decided to make an attack, decided to influence its readership, and then when the person attacked wants to come along and tell their side of it, it seems to me they are only getting what they asked for, debate.

But to give free space seems to me to raise some very difficult issues. I might be for a statute which provided that the paper

would have to give on a nondiscriminatory basis advertising to an opposing view, as long as they paid for it.

Senator PACKWOOD. But you do not feel that way about radio stations.

Mr. BARRON. In terms of the radio stations, of course, there is a cost factor. If we are talking about network television, is prohibitive.

Senator PACKWOOD. Radio stations.

Mr. BARRON. In terms of radio stations it might be that the proponent—the opponent of a particular position for which time has been bought ought to be given that time only if they pay for it. If that is true, I would make a distinction between radio and television.

Senator PACKWOOD. Let me ask if I might Professor Goldoff some questions.

In your testimony—I am looking at your statistics—question 33, "Does the Fairness Doctrine increase or decrease the controversial issue programming broadcast on your station?" Answer: "Only two broadcasters agreed with the FCC that the Fairness Doctrine had a chilling effect. The big majority, 82 percent of the respondents, said it had no effect one way or the other."

And question 38 is, "There is a possibility that the Fairness Doctrine will be eliminated. How would this affect your station's programming practices?"

"Only three network or station executives said deregulation of the Fairness Doctrine would lead to the results foreseen by the FCC—i.e., adding of controversial issues. 86 percent said it would not make any difference."

Well, if such a big group says it will not make any difference, and whoever thinks it will make a difference will help air controversial issues, why not get rid of the doctrine?

Ms. GOLDOFF. I think there are two ways to interpret that. I think that the whole impetus for getting rid of the doctrine was that it was going to make a big difference. I think you are interpreting it the other way.

Senator PACKWOOD. But if 82-86 percent say it does not make any difference whether we have it or not, we will continue to program the same way. They are saying the fairness doctrine does not affect them one way or the other. So, get rid of it. Keep it. They will do the same thing.

Ms. GOLDOFF. So why would I keep it rather than get rid of it? Because they will say they will do the same thing?

Senator PACKWOOD. Yes.

Ms. GOLDOFF. Well, because then you are relying on the broadcaster. You are leaving it up to them. While I think it is a public interest question in that it should be up to the government to establish a public interest standard. But I agree, you can interpret that in different ways.

Senator PACKWOOD. Thank you very much, Mr. Chairman.

Senator INOUYE. Thank you very much. I have been asked by Senator Exon because he has to be presiding at the Budget Committee hearing that he be given the opportunity to speak out of sequence and ask one question. And so if you will bear with me. Senator Exon.

Senator EXON. Mr. Chairman, thank you very much. I am going to be extremely brief. I have just one question that I would like to ask and if I could get a brief reply from Mr. Krattenmaker and maybe one of the other witnesses. My broadcasters in Nebraska who have talked to me about this take the position that you do, Mr. Krattenmaker, that when I pressed them as to why, have they had any problem with this, they say no, that individually they have no particular problem with it at all. But it is the position taken by the association and they are supporting it.

Those of us who have been at the forefront of trying to deregulate, if you will, and take some of the more onerous provisions off of the broadcasters that I think they have had to jump through the hoop on for a long time are a little bit surprised that the industry as a whole has taken the position that they have on this because I do not see anything wrong with it.

I think it is not right to try to compare the broadcasting industry with the newspaper business. True, in most instance the newspaper business today is becoming more and more of a monopoly, but they do not have to get licenses from the Federal Government right or wrong to broadcast, and I think most broadcasters would agree that that is a necessity.

Is there some difference then between the perception and the actual operation of the Fairness Doctrine in the larger cities as opposed to the less metropolitan areas of the country?

Mr. KRATTENMAKER. I do not think so. I think the reason you are getting the reaction you are getting is that the Fairness Doctrine codifies what is already journalistic ethics. That is another reason why it is not a good regulatory policy to enact this doctrine. In the absence of government control, people are going to behave this way most of the time. That is, someone running a radio or TV station generally wants to provide balanced coverage, not slanted coverage.

So, I think the reason that you are hearing from your constituents that it will not make that much difference is that the people running the radio and TV stations in Nebraska do not intend to provide coverage of only one side of an issue once the Fairness Doctrine goes away.

The reason that I think you are hearing opposition to the retention of the Fairness Doctrine is very simple. You have already expressed it. The cost of regulation far exceeds what it is that one has to do at any one given moment.

If I were a broadcaster in your state, I would fear that Mr. Denman was going to come around and complain that one of the advertisements I ran was slanted and then I was going to have to hire a lawyer, etcetera, etcetera.

I am not going to do anything different with or without a doctrine. I am going to air the commercials that come in. But with the doctrine there is this one in 1,000 or one in 100 chance that all of a sudden I am going to have to pay some pin striped guy $250 an hour to get me off the hook with some kid out of law school who is sitting in Washington who thinks that there is something unfair about this 30 second spot that aired out in Nebraska.

So, I think that is why they are opposing the doctrine. They are telling you they do not expect to behave any differently.

Senator EXON. Thank you.

Mr. DENMAN. May I comment on that, Senator?

Senator EXON. Go ahead.

Mr. DENMAN. Well, I do have pin stripes on, but I am not a law student. I am, however, in a position of having worked with groups both in small towns and in large towns across the country. And the Fairness Doctrine makes a significant difference.

If I were to go out onto Constitution Avenue right now and walk across the street to the Capitol building, I would not go until the light turned green. I would wait until it did turn green.

The reason that it is there is that it sets up a law for us to follow. It sets up an easy system for us to adhere to. Some might argue that we could eliminate traffic lights because we all know we're supposed to stop at intersections and crosswalks . However, if the light was not there, it would be a chaotic situation where traffic on the street and pedestrian traffic would be totally confused, resulting in possible injury to both. The same analogy could be applied to the Fairness Doctrine.

The Fairness Doctrine is important because it represents a system of values in this country to support the right of citizens to attain information. And in reference to your comment, the practical application of the Doctrine in local communities is that there tends to be a more direct relationship between members of the community and the local broadcasters. It is smaller, they tend to know each other on a more intimate and friendly basis. They interact more. In a larger city it is much more difficult to establish those relationships.

You also have the economic pressure which is a fundamental concern that we have, and the Fairness Doctrine is so necessary in the larger cities, in particular, because broadcasters face the potential coercion that is caused by the economic interests and the political interests.

I would suggest that it is not the citizens groups, it is not the individuals nor the community organizations that are the concern here. The real concern for coercion, the real possibility for pressure on broadcasters comes from advertisers who only want to present one side of the issue and do not want to have their side responded to.

If I may make one more point, that is why the Fairness doctrine works for broadcasters. It is sort of a good cop/bad cop situation. The Fairness Doctrine allows broadcasters to turn to their advertisers from whom they get support and revenue and they can say, "Hey, it is the Fairness Doctrine. We are only complying with that." So, it does not inhibit the relationship between the advertiser and the broadcaster. It only helps get more information out to the community.

Senator EXON. Well, thank you ladies and gentlemen. Thank you, Mr. Chairman, and thank you to my colleagues. It seems to me that we are talking about so many fine points here, and I understand the concern of an individual broadcaster that one individual someplace could cause an awful lot of trouble and cause an awful lot of expense. Maybe you should come up with some kind of a suggestion that we could change this Fairness Doctrine in some fashion. That might help alleviate that concern that you have expressed, Mr. Krattenmaker.

But I would simply say to you, I think we are going to do something in this area. I think all of us are trying to be reasonable and thoughtful on this proposition, but you are presenting us a yes or a no answer. Maybe there is something in between.

Thank you very much, Mr. Chairman.

Mr. KRATTENMAKER. Mr. Chairman, I am sorry. I realized after I had spoken that my words could have been misunderstood. I would like to put an apology to Mr. Denman here on the record. When I talked about a pinstriped lawyer, I meant somebody in one of these 250 lawyer firms uptown, not Mr. Denman. And when I referred to a kid, I meant some GS–11 who just graduated from my law school who is working at the FCC who is handling this complaint and not Mr. Denman. I realized after I had spoken that either of those could have been construed as a reference to him, and I really apologize to you, sir. I did not mean that.

Senator INOUYE. Senator Danforth.

Senator DANFORTH. Mr. Chairman, thank you. Thank you for scheduling the hearing. I just want to make a point and maybe somebody on the panel would like to respond. I do not know. But I just do not think that the newspaper situation is analogous to the broadcast situation. I think that it is always easy to make the slippery slope argument that if you get a fairness doctrine for broadcasting, somehow that compels us to regulate newspaper coverage. And I do not believe that at all.

First of all, the legislation does not cover newspapers, and to my knowledge, nobody has suggested that it cover newspapers.

Secondly, unlike newspapers, the broadcast media do use the spectrum. They are licensed by the government, it is a free license. It seems to me that to license a limited spectrum is different from the unlimited ability to go to the newspaper business.

And, finally, the force that television particular has on the American people I think creates a unique situation for television. On the average adult Americans spend over four hours a day watching television and a Roper study shows that TV is the only source of news for 50 percent of Americans. So, for all of those reasons it seems to me that it really is not relevant to get into the business of newspapers and to try to draw an analogy between newspapers and television.

I do not know if any of you would like to respond to that point.

Mr. KRATTENMAKER. I am sure other people would like to respond. One reason people do it is because of perceived Constitutional issues. I will hold them for a moment. I will agree there is a Constitutional issue here. Another reason they do it, I have been trying to emphasize the regulatory policy, Senator. One reason to look at the other media is to ask what happens when you do not regulate them. In other words, what is wrong with the print media that you would like to fix.

Senator DANFORTH. I am not suggesting fixing the print media, but I would say that if you were to ask the American people "Do you believe that the press is totally unbiased? Do you believe that it represents points of view? I think a lot of people would say darned right it does. People put bumper stickers on their cars saying "don't believe the Washington Post."

A lot of people feel that the media is not unbiased. I think that everyone in the Congress of the United States who received a teabag in the mail in the last three months might say that it is possible for people who are in the media to take a very strong position on one side of an issue and to go out of their way to generate a public response to their viewpoint.

But what I am saying is nobody is suggesting doing this with newspapers. There is a 40 year tradition of the Fairness Doctrine with respect to the broadcast media. There is, to my knowledge, no tradition with respect to the print media. And I think that the broadcast media has a unique role in its ability to affect thinking of the American people that is simply not shared by the print media.

Mr. BARRON. Senator, I would just like to join in agreeing with some of your observations particularly on the power of television and its impact, as a distinction from the matter of the print media. One of the issues that has been, of course, troubling with the emergence of alternative media is whether the traditional justification for broadcast regulation upon which the Federal Communications Act is based, the scarcity rationale is now outmoded.

A member of courts and writers and so on have suggested that even if the scarcity rationale were to be ruled to be outmoded now because of the variety in the electronic marketplace, that the pervasive impact of television would itself be a basis for regulation. Indeed, the Supreme Court has said that in the Pacifica case in a particular context to be sure.

Another distinction which you mentioned, another rationale for regulation is the fact that the broadcaster relies on the FCC in the way that a newspaper does not rely on any government agency to keep the competition out. In other words, although the broadcasters generally, as Senator Exon said, tend to be against the Fairness Doctrine, they are not heard to be against the licensing process.

Senator DANFORTH. Anyone else?

Ms. GOLDOFF. I would just like to agree with your statement, and I think that we have to get away from this wrong comparison. I am agreeing with you that it is comparing apples and oranges. I realize that what we are talking about is the necessity for public interest regulation of a powerful and scarce resource.

I think that Abraham Kaplan says that public interest values, they are not always automatically or easily attained. But if they are out there as policy goals driving our policies as a safety net as a goal for the average broadcaster, he or she may not understand them perfectly, but it is important to have them as a goal because it is not the right or the power of the broadcaster that is at stake. It is your responsibility to protect the rights of the public and various minority groups. That is most important.

Senator DANFORTH. I would like to raise just one other point, and it goes to the relevance of having a number of different radio stations or television channels that you can tune to at any given time. With the advent of cable television and increasingly with the advent of the satellite dishes, it is possible to get any number of stations at any one time. People said well, that really changes the whole argument. But it is my impression, and I do not know the numbers, that almost any television program in any state is going

to have thousands and thousands of viewers almost any time of day. That is correct is it not?

For example, Sunday morning at 8:00, Friday night at 11:00, whatever. I mean, you pick the hour, you pick the station, and there are going to be thousands of people watching, is that not right?

Mr. DENMAN. Yes.

Senator DANFORTH. Now, I am just thinking of the experience that we have as politicians. If somebody were to tell us get up at 5:30 in the morning to go downtown and appear on "Good Morning America", any of us would do it, even if we had been up all night. Up and at 'em to get on "Good Morning America".

If you were to say to any of us as politicians, you have to get back to your state today to make a speech before 5,000 people, we would be on that airplane, because that is our business, to try to communicate ideas, even for five minutes on "Good Morning America" or 30 seconds on the evening news or before 5,000 people in Kansas City or someplace. To reach a large audience is the goal, and the fact that there are a number of sources reaching that large audience also seems to me to be of little relevance.

The fact of the matter is the volume, not the percentage in the market, the volume, the force and the volume, and the fact that 50 percent of the people of this country get all of their news from television. That is their source of information. And if you can have a television program at any hour of the day reaching 25,000, 50,000, 100,000 or more people in a single state, that is enormous power over the basic medium of politics in this country, which is the communication of ideas.

That is why I believe the fairness doctrine is important.

Mr. KRATTENMAKER. It seems to me, Senator, that what you are saying is that if someone in your home state organizes an event at which you are to give a speech to 25,000 or more people, it is fundamentally unfair for that person not to invite your opponent to speak as well and to invite members of the Libertarian Party and I do not know what else.

And I cannot imagine a view that is more antithetical to the First Amendment.

Senator DANFORTH. No, sir, I have never said that. I have never said that. I have never suggested that. And, in fact, I have never thought that. What I am saying is that we should not have in this country gatekeepers, gatekeepers for public information. And here we have not just the inviter of a speaker once, but we have licensed, free licenses in fact, gatekeepers of what the public hears and what the public does not hear, and I do not think that there is any right to operate as the licensed gatekeeper of thinking.

Mr. DENMAN. Senator, I agree with you fully. The public owns the airwaves. The broadcasters are trustees of that resource. And inasmuch as broadcast media is the most influential information source in our society, it is essential, as you say, that those gates are not shut. And also, given the fact that there is, indeed, a limited spectrum and by necessity requiring regulation, it is essential then that the public maintain the right to information and have a method by which they can be assured that they will get that information.

And a healthy democracy requires that, I am sure that as a politician you can appreciate that. As we see the decline in the numbers of people who are going to the polls to vote, one of the major reasons is because they are not getting enough information, enough factual information.

We get more and more of the trash TV, if you will. We can turn on anytime and see the divorced spouses of the cross-dressing snake handlers if we want. But what we are not seeing, especially since the FCC's decision in 1987, is what we were told would happen, which is a blossoming of a thousand flowers of discussion of controversial issues of public importance.

What we are seeing is more "sameness," whether you turn the dial to one radio station or the next or one TV station to the next, we are seeing more of the "sameness." And I think the Fairness Doctrine ensures that those controversial issues of public importance which affect our communities deeply, will be heard. The Fairness Doctrine allows us to get the information we need to become an educated electorate, it provides for a healthy democracy.

Senator INOUYE. Thank you very much.

Senator Breaux.

Senator BREAUX. Thank you, Mr. Chairman, and I thank the members of the panel. I apologize for arriving late and not having the benefit of your testimony before the committee.

Professor Krattenmaker, thank you for your statement. I am intrigued by your comment that editorial control over what is said should be lodged in private and not governmental institutions.

I am confused as to how a fairness doctrine would infringe upon that position that you are taking in that instance because my perspective of the Fairness Doctrine would not limit a licensee's ability to say what they want to say over the airwaves as long as they are fair in giving the other position an opportunity to also be represented.

A licensee would be able to do an editorial and say whatever they want to say about whatever subject as long as they also are fair in covering other viewpoints. So, I would like you to elaborate on how you think that Fairness Doctrine would be a restriction or editorial control over what they say.

Mr. KRATTENMAKER. Sure. I do not have the exact language, Senator Breaux, but you said that the Fairness Doctrine permits, and you are quite correct in your statement, that the law permits them to do what they want, so long as they are fair in giving the other side the opportunity to reply.

We have government control over what is said in both the definition of what is fair and what is the other side.

Senator BREAUX. In other words, you are saying that if we had the Fairness Doctrine, they could say you did not do enough, and therefore, you have not been fair.

Mr. KRATTENMAKER. That is right. What you said is not the other side. This is what we think the other side is. Now, you go say it.

Senator BREAUX. I am also intrigued and perhaps someone on the panel can comment on it, by the number of station licensees who have spoken to me about it and they have expressed very strong belief that they are already being fair, and therefore there

is no need for Congress coming in and in fact spelling out their legislative directive of a fairness doctrine.

I guess my concern is what is the problem. If you are being fair, if 99 percent of you are being fair, and I totally agree with that, and perhaps there is 1 percent that affects an awful lot of people who are in fact not covering both sides of controversial issues. Can anyone tell me why they would object, and this is not your case. You are not defending licensees, but as I say, we are all doing it. Then why is there an objection out there in society? Is it just on a matter of principle or what is it?

Mr. GOLDOFF. I think Robert S. Lane studied the regulation of businessmen in the fifties, and he found that regulation was not burdensome so much economically as businessmen felt it was a burden psychologically because it interfered with their free enterprise *laissez-faire* beliefs. So, I think it may be a psychological burden, it is not going to really change their behavior.

But, again, getting back to what we were talking about earlier and what Senator Danforth was just saying, I think it is sort of good to have that guarantee out there. Why leave access to this powerful medium. To one grout in society? Why restrict access? Why leave it totally up to the broadcaster who in most cases is fair? If the Fairness Doctrine is not intrusive and it is not costly to implement, I think it is a good public interest policy to have out there as a safety net for the rest of the people.

Senator BREAUX. Mr. Krattenmaker.

Mr. KRATTENMAKER. Two things. Suppose it were also the case that 99 percent of all restaurants in this city provided fast services. If you decided what you wanted to do is to promulgate a regulation requiring restaurants to provide fast service because you were worried about the 1 percent that did not, I would expect those 99 percent to oppose that bill, and I think they would oppose the bill because you have essentially put an additional tax on their doing business.

They now have to comply with whatever governmental regulations you write with your definition of fast service and they have to run the risk that once in a while, it could be once in a hundred, it could be once in a million times that they serve food that someone alleges plausibly that they have violated the regulation and they now have to defend themselves against that kind of regulation.

I think it is bad regulatory policy when you see 99 percent of restaurants providing fast service to say oh, well, why do we not just tell the other 1 percent to do it as well.

Senator BREAUX. But is there not really, Professor, a fundamental—

Mr. KRATTENMAKER. I do not see any difference with the fairness doctrine. If you think that 99 percent of the stations are, in fact, compelled by competition in the marketplace or by journalistic ethics, as I suspect is probably the case, to behave in this way, then it seems to me that promulgating this regulation would either mean that there is something utterly immoral about somehow behaving in a different way, and we know that is not the case because with all of the other communicators in society, we do not say you are immoral if you give only one side of the story.

Senator BREAUX. Professor, is there not a very fundamental difference in the example that you cited in the sense that a restaurant is not operating in a public spectrum. It is not operating through a public resource that belongs to all the people. They have the right to do whatever they want, do whatever sells the most food is what they are driven by whereas here you are talking about a very limited public spectrum resource. And, therefore, that analogy, it falls based on that very basic fact.

Mr. KRATTENMAKER. I do not think so because it meant only to comment on the issues of regulatory policy. That is, it does not make sense to spend government resources telling people to do things when 99 percent of them do it already. And I do not think that matters whether they have a license or not. I think the license argument is a wholly different proposition. That is a proposition either that if you want to do it, it will be Constitutional or that if we think that only 60 percent of broadcasters are being fair, that we have somehow some special obligation because they are using——

Senator BREAUX. Suppose it was the other way around. Suppose 99 percent was not being fair, just for the sake of argument, because that is not the situation and 1 percent are giving both sides a fair hearing. Does that get closer to you intriguing you towards being for some type of a public doctrine saying that fairness should be the law of the land?

Mr. KRATTENMAKER. Frankly, no, it does not, but it certainly moves me away from that regulatory policy objection. So, that now it might be a good regulatory policy if we get our First Amendment goals squared away. I suspect that it may be the case that 99 percent of all—I do not know how to get the definition right. I want to take weekly magazines but I want to exclude the mass audience. I want to exclude Time, U.S. News & World Report and Newsweek and maybe Sports Illustrated, a few of those. I think if we could somehow define them out and take the rest of the market to be magazines, they may fit that definition. I think 99 percent of them may be unfair.

If you have the effective ability to choose among them, I do not think that you would want to say well, I have decided that the National Review ought to start to be fair.

Senator BREAUX. Well, we go back to that fundamental difference. They are not using a limited spectrum in order to reach their audience.

Mr. KRATTENMAKER. Oh, yes, they are.

Senator BREAUX. They can produce as many magazines and sell them in as many places without having to ask for permission, can they not?

Mr. KRATTENMAKER. Well, they have to cut down trees.

Senator BREAUX. But there is not a shortage of trees.

Mr. KRATTENMAKER. Yes, sir, there is.

Senator PACKWOOD. Oh, yes, there is.

Senator BREAUX. We have a lot of trees in Louisiana. I hear your statement. It is a difference of degree, though. Thank you, Mr. Chairman.

Senator INOUYE. Senator McCain.

Senator MCCAIN. Mr. Chairman, I am sorry I came in late, and I am sorry I did not hear the opening statements and the arguments, so I am a little reluctant to jump into this, but I notice that Professor Goldoff, according to this briefing paper that I am reading, cited some study where in New York there was no chilling effect, is that correct?

Ms. GOLDOFF. That is right. That is my study.

Senator MCCAIN. I would like to respond to that, and that is I do not know how things are in the Big Apple, but I know how things are in Arizona, in the state that I live in. I know of several cases where the chilling effect was clearly evident in a race that I was in and several others. And I can cite that as evidence. Now, perhaps up in New York where there is lots of money and they can all afford lawyers' fees, and it is a very litigious society that exists up there, that is fine. But small radio stations in my state—facing enormous lawyers fees—see that as impacting their budgets. They see that as impacting their ability to operate, and so they just opt out.

I do not question what happens up in the state of New York, but I know in my own state that the chilling effect has taken place. I know it for sure, and I know it is in existence today. And I frankly am not interested in seeing small radio stations in my state go out of business or devote a significant part of their budget to legal fees which they tell me they are required to do.

Now, I am sure Mr. Denman will have some response to that here in Washington with his little circle of friends that he will find that now to be the case. I know it is the case because I have talked to the radio station owners and I know it and they know it. And I find it very disturbing that we are forcing these people not to carry the news on controversial issues which is the effect of this so-called Fairness Doctrine. And I will be glad to hear responses from any of the witnesses. And with that, Mr. Chairman, I would—I always enjoy hearing cogent and emotional arguments of my friend from Oregon who has a much longer and involved commitment on this issue.

Ms. GOLDOFF. Well, Senator, in New York the broadcasters I spoke to did not spend a lot of money on the Fairness Doctrine, and it did not get to litigation. I think that the sense of the panel has been that a lot of Fairness Doctrine complaints—there are very few Fairness Doctrine complaints received, and most are handled informally. They do not cost stations or networks hundreds of thousands of dollars.

And I would like to know in Arizona how does the Fairness Doctrine cost a small radio station so much money. All they have to do is if they handle a controversial issue, they have to handle it fairly and give both sides. So, how does that cost them a lot of money?

Senator MCCAIN. Easy, ma'am. Surely you are aware that it is the threat of invocation of the Fairness Doctrine that causes these people to act in a certain fashion, particularly when they are faced with the possibility of going to court in order to fight the so-called implementation of those Fairness Doctrines. That is where they incur the legal fees and the threat of incurring those legal fees is what causes them to have to behave in the fashion in which they do, not the actual implementation of it.

Mr. DENMAN. If I may, our experience, again, Senator, is that in 95 percent of the cases before the FCC's decision—even more than 95 percent of the cases around the country that we worked with—there was no chilling effect. The citizens worked in an amiable relationship with the broadcaster when it was perceived that there was an imbalance on controversial issues of public importance.

I am not familiar with your particular case and what happened in that. However, our experience does not indicate that that is the case in other parts of the country.

And the other point I would make is that after the FCC's 1987 decision, I would be interested in knowing what has happened with those broadcasters?

Senator MCCAIN. They just play music. They just play music, and that solves their problem. And, therefore, the people within broadcast range of them do not receive information on controversial issues. It is very clear.

Mr. DENMAN. So, after the Fairness Doctrine decision by the FCC, they are not doing anything to cover controversial issues?

Senator MCCAIN. The threat of a Fairness Doctrine suit which they cannot afford to fight then causes them to say okay, we will not address these issues. We will play music or we will talk about farm prices or whatever it is that is noncontroversial. That is what they do, Mr. Denman. That is what they do, Mr. Denman.

Mr. DENMAN. What I am trying to get at is that after the FCC's 1987 decision, our experience is that the controversial issues of public importance (which the broadcasters indicated prior to that decision would be discussed if the Fairness Doctrine did not exist) are, in fact, not being discussed. That is not happening, and apparently what you are saying is that is true. That coverage is not happening.

Senator INOUYE. The committee is aware that Dean Krattenmaker has to leave to return to his duties, and before he does, on behalf of the committee I thank you very much for your contribution to this debate.

Senator MCCAIN. Mr. Chairman, could I ask before the Dean leaves if he has had similar experience from the one that I have just described?

Mr. KRATTENMAKER. My experience, Senator, is not with running a television station but with trying to look at the regulatory policy side. As I tried to indicate in my statement and as I talk about at greater length in the attached law review article, I believe that this doctrine acts as a user tax on discussion of issues of controversy and public affairs and that the principal effect of the Fairness Doctrine when it severed out from the various other incentives that are at work in this industry is it has to be to retard the amount of time spent on discussion of controversial issues of public importance.

It is a debate-inhibiting, public-discussion-dampening doctrine that if it were described that way would not be able to get three votes.

Senator MCCAIN. Thank you. Thank you, Mr. Chairman.

Senator INOUYE. I can sense Brother Packwood's eagerness to get back into debate. Senator Packwood.

Senator PACKWOOD. I just want to go back to this Florida case again. Professor Barron, here is what the statute says. If any newspaper in its columns assails the character of a candidate and whatnot and then—you are entitled to the response time. So, it is not limited to editorials, correct?

Mr. BARRON. No, I covered that point in my response to you. I said that the Florida Supreme Court construed the statute. They gave the statute a limited construction and basically, said that it would only apply to editorial attacks. In other words, they give it what is called the savings construction.

Senator PACKWOOD. No, that is not what they did in that case. What they had was two editorial attacks. They limited their decision because that is all they had before them. They did not say it is only limited to editorials.

Mr. BARRON. Our argument to the Supreme Court of the United States was based on that.

Senator PACKWOOD. Based on the facts of the case?

Mr. BARRON. Well, I am trying to answer your question, but it is a little hard. We read the Florida Supreme Court differently than you do, and we read it to limit it to editorial attacks in our brief. Essentially, the Supreme Court so stated.

Senator PACKWOOD. Well, Mr. Chairman, I will not pursue this now. I appreciate very much the time.

Senator INOUYE. Senator McCain?

Senator MCCAIN. No, thank you, Mr. Chairman. I would like to thank the witnesses because I think this is a very, very, very important issue that we are talking about, and I respect their viewpoint. I think they have made a very important contribution to the debate, and I hope that our remarks are not construed as any attack or anything personal. I appreciate your advocacy in providing the kind of information I think that the American people need in their representatives, but it is a very difficult issue. And unfortunately we have been wrestling with it for some years, and I do not think we are going to resolve it this year or in this session of Congress, but I do appreciate your involvement in the issue, and I thank you, Mr. Chairman, for having this hearing.

Senator INOUYE. Senator Breaux.

Senator BREAUX. I just wanted to comment on my good friend from Arizona about the chilling effect. Well, the last time I was in Arizona, the airwaves were full of Evan Mecham. They were not holding back then, I want you to know.

Senator MCCAIN. I remember that nightmare.

Senator BREAUX. Thank you, Mr. Chairman.

Senator INOUYE. Well, I have been sitting in this chair for many years now, and I must say that this has been one of the more interesting mornings, and I thank all of you for participating in this mini debate and thank you for your contribution to our cause.

The committee will have a debate to decide whether we shall report this measure or not. So, once again, thank you, and the hearing will stand in adjournment.

[Whereupon, at 10:33 a.m., the subcommittee adjourned subject to the call of the Chair.]

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

NATIONAL ASSOCIATION OF BROADCASTERS,
Washington, DC, March 14, 1989.

Hon. DANIEL K. INOUYE,
Chairman, Subcommittee on Communications, Senate Committee on Commerce, Science, and Transportation, Washington, DC.

DEAR MR. CHAIRMAN: Attached is a copy of the recent testimony of Philip Jones, Executive Vice President of the Meredith Corporation, before the Subcommittee on Telecommunictions and Finance of the House Energy and Commerce Committee.[1] Mr. Jones represented the National Association of Broadcasters at the Subcommittee's hearing on the fairness doctrine and H.R. 315, the Fairness in Broadcasting Act of 1989.

I respectfully request that this statement be included in the record of the Communications Subcommittee's hearing on the fairness doctrine.

Kindest regards,

EDDIE FRITTS.

ASSOCIATION OF NATIONAL ADVERTISERS, INC.,
Washington, DC, March 15, 1989.

Hon. ERNEST F. HOLLINGS,
Chairman, Committee on Commerce, Science, and Transportation, Washington, DC.

DEAR CHAIRMAN HOLLINGS: In view of today's hearing of the Communications Subcommittee of the Senate Commerce, Science and Transportation Committee on the possible reinstitution of the Fairness Doctrine, the Association of National Advertisers, Inc. (A.N.A.) would like to provide for the hearing record our comments on this issue which were made to the Federal Communications Commission during its 1984 examination of the Fairness Doctrine.

As you know, A.N.A. is the only association exclusively committed to serving the interests of companies that advertise either regionally or nationally. Our membership includes companies with over 2,000 subsidiaries, divisions and operating units throughout the United States. A.N.A.'s members market a variety of goods and services and collectively account for almost 80 percent of all regional and national advertising expenditures in the Unites States.

A.N.A.'s major concern with the reinstitution of the Fairness Doctrine is that under the previous F.C.C. policy broadcasters' fears of incurring Fairness Doctrine obligations often led them to reject what they considered potentially controversial advertising. As our statement notes, the result was that advertisers' First Amendment rights were derivatively violated. In A.N.A.'s view these concerns, which we raised in 1984, are just as true now as they were then.

A.N.A. stands ready to respond to any questions or concerns you may have in regard to these views.

With best wishes.

Sincerely,

DANIEL L. JAFFE.

Enclosure [2]

AMERICAN ASSOCIATION OF ADVERTISING AGENCIES INC.,
Washington, DC, April 17, 1989.

Hon. ERNEST F. HOLLINGS,
Senate Commerce, Science, and Transportation Committee, Washington, DC.

DEAR SENATOR HOLLINGS: Enclosed herewith, please find a copy of the comments on the Fairness in Broadcasting Act of 1989, filed by the American Association of

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[1] See House hearing number 101-2

[2] The enclosure was not reproducible.

Advertising Agencies (A.A.A.A.) with the House Subcommittee on Telecommunications and Finance on April 10. These comments confirm the standing opposition of the A.A.A.A. to codification of the Fairness Doctrine.

The A.A.A.A. members appreciate the opportunity to reaffirm the advertising industry's concern over regulating broadcasters in such a way as codification presents. The basic underpinnings of the comments object to the findings that broadcast airways are a scarce resource, and that the "chilling effect" does not occur. Furthermore, the A.A.A.A. argues that the Fairness Doctrine circumvents the broadcaster's constitutional rights to exercise programming and editorial judgment.

Respectfully, we submit these comments for your consideration with respect to the pending markup of S. 557 on April 18.

Sincerely,

HAROLD A. SHOUP.

Enclosure. [3]

[3] See House hearing 101-2

RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, INC.

RTNDA

1988-89 BOARD OF DIRECTORS

CHAIRMAN OF THE BOARD
Bob Priddy
The Missouri Network
Jefferson City, Missouri

CHAIRMAN-ELECT
Tom Bier
WISC-TV
Madison, Wisconsin

TREASURER
Lou Prato, Medill News Service
Washington, D.C.

PAST CHAIRMAN
Bob Brunner, WSAZ-TV
Charleston-Huntington
West Virginia

REGIONAL DIRECTORS
Bill Ewing, KPTV
Portland, Oregon *(1)*

Bill Yeager, KFBW
Los Angeles, California *(2)*

Brian Olson, KGWN-TV
Cheyenne, Wyoming *(3)*

Melanie Miller, KTRH NewsRadio
Houston, Texas *(4)*

Dick Heidt, KFYR-TV
Bismarck, North Dakota *(5)*

Edward Dermody, KMA Radio
Shenandoah, Iowa *(6)*

Gene Slaymaker, WTLC/WTUX
Indianapolis, Indiana *(7)*

Gary Hanson, WKBN-TV
Youngstown, Ohio *(8)*

Jimmie Poritz, KTBS-TV
Shreveport, Louisiana *(9)*

Bill Lord, WKRN-TV
Nashville, Tennessee *(10)*

Jeff Marks, WCSH-TV
Portland, Maine *(11)*

John Corporon, INN/WPIX
New York, New York *(12)*

Georgeann Herbert, WTAR/WLTY Radio
Norfolk, Virginia *(13)*

Lee Hall, WSB Radio
Atlanta, Georgia *(14)*

George Clark, CFPL-TV
London, Ontario, Canada

DIRECTORS-AT-LARGE
Debbie P. Bolton, WTOC-TV
Savannah, Georgia

Mike Freedman, UPI Radio Network
Washington, DC

David Lampel, WBLS/WLIB
New York City, New York

Tom Lulak
WTMJ/WKTI & WTMJ-TV
Milwaukee, Wisconsin

EX OFFICIO DIRECTORS
President, NBEA
Charles Thomson
KYW-TV/Radio
Philadelphia, Pennsylvania

Head, AEJMC Radio-TV Division
Tony Atwater
Michigan State University
East Lansing, Michigan

PRESIDENT, RTNDA CANADA
John Hannen, CHFI Radio
Toronto, Ontario, Canada

PRESIDENT
Ernie Schultz
1717 K Street, N.W., Suite 615
Washington, DC 20006
(202) 659-6510

March 27, 1989

The Honorable Daniel K. Inouye
Chairman, Subcommittee on Communications
Committee on Commerce, Science and Transportation
United States Senate
Room 227
Hart Senate Office Building
Washington, D.C. 20510

Hearings on S. 577, "The Fairness in Broadcasting Act of 1989"

Dear Mr. Chairman:

The Radio-Television News Directors Association is opposed to the fairness doctrine and its codification through the above-referenced bill. We respectfully request consent by the Subcommittee to the inclusion in its hearing record of this letter and the attached Statement by John Spain, News Director of WBRZ-TV, Baton Rouge, Louisiana, appearing on behalf of RTNDA at House subcommittee Hearings on H.R. 315, February 9, 1989.

RTNDA would like to supplement Mr. Spain's remarks by calling your attention to the opinions of the U.S. Court of Appeals for the District of Columbia Circuit in Syracuse Peace Council v. FCC, Case No. 87-1516, decided February 10, 1989. The entire Court of Appeals upheld the Commission's findings and predictive judgments about the fairness doctrine's chilling effects and the significance of media diversity (Slip op., Williams, J., at 13-22). Judge Starr, who reached the First Amendment question, thought that the FCC's findings against the fairness doctrine placed a heavy burden on the Congress to justify reimposition of the doctrine (id., Starr, J., at 17-19). Especially in the absence of any material increase of broadcaster unfairness since repeal of the fairness doctrine, we do not believe that the advocates of the fairness doctrine can meet their burden of justifying it.

1989 International Conference and Exposition
September 13-16, Kansas City, MO

Scott Denman, in his statement for Safe Energy Communication Council, claimed before the Subcommittee that his group's experience with broadcast stations during the 1988 fall election period is evidence that broadcasters are not as fair without the fairness doctrine. To the contrary of Mr. Denman's intended point, his group's threats of using the fairness doctrine against broadcasters at the FCC has produced a record of chilling effects on the broadcasters' exercise of independent journalistic judgment. The capitulation of broadcasters to the program demands of Mr. Denman's organization are entirely consistent with the FCC's findings that, regardless of the merits of fairness complaints, broadcasters seek to avoid predictably large legal fees and consumption of management time, as well as any risk whatsoever to renewal of station licenses, in dealing with the FCC.

The Court of Appeals upheld the FCC's reasoning to that effect with respect to another special interest group's experience, the court pointing to "evidence from Public Media Center that after it had warned broadcasters that it would demand free response time from stations that accepted advertising on a specific controversy, more than two-thirds of those contacted had refused to sell advertising on the subject at all" (id., Williams, J., at 18). In answer to arguments that broadcasters should not be deterred from sticking to their journalistic judgments when they are right or when the government's requisite "fairness" could be easily achieved, the Court stated (id. at 20):

> "Surely the FCC is right. The fairness doctrine applies to ordinary mortals who adjust their affairs on the basis of estimates of risk. The estimating process costs time and effort. It hardly disproves an alleged deterrent effect to suggest that by more careful research or analysis, or by greater brilliance, the deterred party might have come out the other way."

There are many instances of "chilling effects" documented at paragraphs 42-71 of the FCC's Fairness Report (102 F.C.C.2d 145, 169-88 (1985)) and commented upon at paragraphs 42-51 of the FCC's Memorandum Opinion and Order on the Syracuse Peace Council decision repealing the fairness doctrine (2 F.C.C. Rcd. 5043, 5049-50 (1987)). There are documented cases of threats and use of the fairness doctrine by national political figures (102 F.C.C. 2d at 192-94; see also Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 78 & n.62 (D.C. Cir. 1972)(Bazelon, C.J., dissenting)).

In the attached testimony to the House subcommittee, Mr. Spain recounts a personal experience with the inhibiting effects of the fairness doctrine. He also makes a point about the great diversity of media in even relatively small markets like his own. The Subcommittee is referred to the FCC's findings on the diversity of mass media sources nationally at paragraphs 66-72 of the Memorandum Opinion and Order in the Syracuse Peace Council case (2 F.C.C. Rcd. at 5053-54).

The Court of Appeals affirmed the Commission's findings on media diversity. It pointed out that the new program sources are "plainly not trivial in the aggregate, as they have driven the networks' audience share down from 90% in 1982 to 76% in 1984" (Slip op., Williams, J., at 16). The networks' audience share was down to 68% in 1988 (Nielsen TV Audience '88 at 27). The Court dismissed arguments that the FCC was overly concerned with aggregate or national figures at the expense of local data; the number of households which receive five or more non-cable television signals is "a whopping 96%," and that convinced the Court that "only a diminutive share of the population has been unaffected by the growth the Commission has recounted" (Slip op., Williams, J., at 17). In his concurring opinion, Judge Starr concluded that spectrum allocation scarcity -- the inability of every would-be applicant to obtain a broadcast license -- does not undermine the significance of the actual numerical diversity of mass media (id., Starr, J., at 20-23). Simply put, broadcasters cannot afford to be unfair in the face of so much numerical diversity and competition.

Lastly, the Court of Appeals concluded that the Commission had acted reasonably in removing the first part of the fairness doctrine (id., Williams, J., at 30-32); and there is no evidence since repeal of the doctrine that broadcasters will not continue to present programming on controversial issues of public importance.

In sum, the Congress should not enact S. 577 or any other legislation to require a fairness doctrine for broadcasting.

Sincerely,

Ernie Schultz
President

Attachment

WRITTEN TESTIMONY OF WENDY COLLINS PERDUE TO

THE SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON THE FAIRNESS DOCTRINE

During the fall of 1988, I was actively involved in a local referendum ballot issue. This experience gave me an opportunity to observe first hand the importance of the Fairness Doctrine in insuring that the public is informed about all sides of controversial issues. I believe the experience is particularly instructive because it occurred at a time when obligations under the Fairness Doctrine were somewhat unclear. The Meredith decision had come down and some thought this had brought a complete end to the Fairness Doctrine. On the other hand, shortly after that decision FCC Chairman Patrick had written Rep. Dingle and stated that "The Commission will continue to accept, investigate and act upon complaints on matters that do not clearly fall within the scope of the Meredith decision including ... ballot issue cases." Some of the stations we approached thought they still had an obligation under the Fairness Doctrine, others did not. We discovered that stations provided a meaningful presentation of opposing views only if they thought they were required to do so.

Background--A Typical Ballot Issue. The ballot issue in which I was involved was a classic local referendum issue that pitted a broad-based but underfinanced citizen group against a well financed and concentrated business interest. Montgomery County had authorized construction of a county parking garage to provide parking for a proposed private commercial project. The citizen group with which I worked had initiated the referendum drive in order to overturn this County decision. The referendum was widely perceived to be a vote on not only the garage and the private commercial project, but also on County growth policy. The issue was quite controversial and over 90% of those who went to the polls voted on this question. Our group spent approximately $22,000 on the campaign, with that money having been raised through hundreds of small contributions. By contrast, the group supporting the garage spent approximately $540,000, nearly 25 times what we spent, with over $460,000 coming from the one developer whose project would have benefitted from the garage. Notwithstanding this huge disparity in resources the election was fairly close. The vote was 47% to 53% in favor of the garage.

The Campaign--One Side Purchases Air Time. Most of the campaign on this issue was fought out through yard signs, leaflets and letters to the editor. However, in the last two

weeks before the election, the supporters of the garage purchased several hundred thousand dollars of time on 11 radio and 4 television stations.

Our Attempts to Get Opposing Views Aired. When we learned that the other side had purchased radio and television time, another volunteer and I contacted all the stations to determine how they proposed to fullfill their obligation to present opposing views. Because of our limited resources, we could not afford to purchase time ourselves. Many of the stations readily acknowledged that at least as to ballot issues they continued to have an obligation under the Fairness Doctrine to present opposing views. These stations offered to air our views, without charge, during times of the day (though not as frequently) that were comparable to those purchased by the proponents of the garage. Several other stations initially denied that they had such an obligation and were unwilling to discuss any mechanisms for airing opposing views. After consultation with their lawyers, these stations concluded that they did have obligations under the Fairness Doctrine and they then offered comparable time without charge for the presentation of opposing views. In all, nine of the stations acknowledged that they had an obligation under the Fairness Doctrine. Two of the stations remained adamant that they had no obligation to air opposing views on this issue. Both indicated, however, that in the interest of being "good citizens", they would air opposing views. Both offered similar arrangements--they would tape a five minute interview with a representative of our group and air it before 7 a.m. on Sunday morning. (The advertisements of the garage proponents were running throughout the day on both stations.) Fortunately, we were able to secure the assistance of Andrew Schwartzman of the Media Access Project to aid us in dealing with the larger and more important of the two intransigent stations. Following his intervention, the station notified us that it had changed its position and it offered us comparable time with out charge in which our views would be aired.

Our experience with the TV stations was similar. Three of the stations readily acknowledged an obligation to air opposing views. Two of these offered to air without charge an advertisement that we had prepared. The other station offered us on opportunity to have a spokesperson express her views in a "sound-off" segment to be aired during the news. The fourth station denied that it had any obligation to air opposing views. It further asserted that even if it had such an obligation, it had fulfilled that obligation by virtue of having run one news story on the referendum several weeks earlier. This station never did air opposing views and the election occurred before we were able to persuade it to do otherwise.

Interesting, not one station, including those that readily acknowledged their obligation under the Fairness Doctrine,

indicated that it had any plans to take the initiative itself to air opposing views on this issue. This was true even of stations that indicated that they were aware that this was a controversial issue, that there were significant opposing views and that we were the major organization opposing the garage.

Comparison with Print Media. The garage issue received far greater covereage in the local newspapers than it did on radio or television. In addition to news stories, the newspaper editorial pages were a virtual bulletin board on the issue. Week after week the papers ran letters to the editor discussing all sides in this issue. More important than the newspapers was the fact that we were able to distribute extensively our written message without having to go through an intermediary such as a newspaper. With access to a word processor and photocopy equipment, we produced our own newletters, flyers and brochures and distributed them with the assistance of volunteers. If the written message were comparable to the electronic media, access to the electronic media would have been less critical. However, I believe it is naive to think these are comparable. The recent presidential campaign and the battle concerning the proposed government pay raise both demonstrated the power of the electronic media.

Conclusions From Our Experience. The Fairness Doctrine increased the amount of time stations devoted to opposing views on this controversial local issue. There is no evidence that the proponents of the garage had any difficulty purchasing time from stations that recognized an obligation to air opposing views. There is, however, strong evidence that the willingness of stations to devote time to opposing view was linked directly to the Fairness Doctrine. Those stations that believed they had no obligation were unwilling to do any meaning coverage of opposing views. No one who has been involved in a campaign would believe that listeners receive a balanced presentation of ideas when the views of one side are presented frequently throughout the day and opposing views are presented only once, either several weeks before the election or in a predawn Sunday morning talk show. Even as to the stations that recognized an obligation, it was clear from our conversations with them and from the fact that none of them sought us out, that it was only because of the Fairness Doctrine that they were airing opposing views. There is no question that with respect to this ballot issue, the Fairness Doctrine produced more speech not less speech.

Clear rules are important. Although we had the assistance of a sophisticated communications lawyer, other citizen groups in other parts of the country frequently will not be so fortunate. Under the tight time deadlines of an impending election any uncertainty about stations' obligations creates strong incentives for stations to stall until the matter becomes moot.

The Fairness Doctrine is particularly important with respect to ballot issues. State and local ballot issues seem to be growing in prominence and these frequently pit the interests of widely dispersed citizens, without access to substantial financial resources, against concentrated business interests that are able to raise very large sums of money. This disparity is exascerbated by the fact that are no contribution limits on ballot issues. See Citizens Against Rent Control v. Berkley, 454 U.S. 290 (1981). Without the Fairness Doctrine, there is a substantial risk that our election process will subverted by the ability of some groups to run massive advertising campaigns and present their views without serious rebuttal.

Testimony of Dr. Craig R. Smith, President, the Freedom of Expression Foundation, and Director, Center for First Amendment Studies, California State University, Long Beach.

The Freedom of Expression Foundation, recently re-located to California, is a non-partisan, non-profit, research organization dedicated to providing a better understanding of the relationship between the First Amendment and new media technologies. Our boards are composed of some of the most pretigious names in the media including Katherine Graham of the Washington Post, Jack Valenti of the Motion Picture Association, and Robert Erburu of the Los Angeles Times. Along with its books, educational materials and campus lecture series, the Foundation has provided testimony on the subject of the fairness doctrine to this committee and others over the last six years. Our most recent research confirms the position we have taken in the past: the fairness doctrine is unfair and unconstitution.

Furthermore, statements by members of Congress and others in support of the fairness doctrine indicate that they are willing to ignore constitutional guarantees for broadcasters in order impose controls on the electronic media of a medieval kind. A look at history reveals the parallels.

Rulers have long been wary of technology that improve communication among their subjects and provide new ways by which dissident views can be spread. When Gutenberg introduced moveable type by printing Bibles in Mainz in 1456, local officials immediately placed restrictions on the new device. Charles VII of France sent Nicholas Jensen to find out what the new press could do. He became an apprentice to Gutenberg and assured Charles that the device was under strict watch by the authorities. By 1486, civil authorities heeded the pleas of Archbishop Berthold von Henneberg to establish Commissions of Censorship in Frankfurt and Mainz for all published works. These restrictions eventually led to the collapse of the book fair in Frankfurt.

In 1476 the new press was introduced in England under the reign of Edward IV; ten years later, Henry VII restricted its use to prevent "forged tydings" and seditious documents. Henry VIII expanded the suppression by making sure that all presses were licensed and subject to prior restraint. By 1630 there were only 23 master printers and 55 presses in the Kingdom, all in London save two, and all directly responsible to and licensed by the crown.

No better example of our government's inconsistent and confused treatment of media exists than the difference in the ways print and electronic media have been regulated. The last serious attempt to regulate the content of a newspaper was swept away by a unanimous Supreme Court in 1974. In Miami Herald v. Tornillo, the Court held that equal space provisions written into Florida's law were unconstitutional.[1]

Such protection has not been accorded the electronic media even when they serve the same purposes as newspapers. The reasons for this double standard can be traced back to the 1920's. As radio grew like Topsy, signals between stations began to interfere with one another and with naval operations. Some order had to be brought to the chaos. And so, in 1927, at the behest of Secretary of Commerce Hoover, Congress passed the Dill-White Radio Act which created the Federal Radio Commission, the forerunner of the Federal Communications Commission.

The new legislation required federal licensing of broadcasting stations and stipulated that stations must operate in the "public interest" and provide candidates for office equal opportunities for air time.[2] The law was first tested in 1929 when a radio station owned by the Chicago Federation of Labor was denied increased operating time because the Federal Radio Commission deemed its programming not in the public interest. This decision established the principle that an agency of the federal government could evaluate news, editorial content, and entertainment programming in order to determine whether a license to broadcast should be renewed. That power was used for the first time in 1931 when the Federal Radio Commission denied a license and justified its decision with an evaluation of the content of broadcast programming. The right of the government to regulate the content of broadcast programming has been the rule ever since.

In 1934, Congress revised the 1927 Act as the Communications Act. The new act expanded the authority of the Federal Communications Commission (FCC) giving it power over telephone,

telegraph, and, by extension, television. For example, in 1941, the FCC handed down the Mayflower decision, ruling that the Yankee Network would have its license renewed contingent upon its agreement not to editorialize. The Commission said, "the broadcaster cannot be an advocate."

In 1949, the FCC promulgated the "fairness Doctrine." The policy effectively overturned the Mayflower decision in that it encouraged editorializing but attempted, at the same time, to avoid the dangers it believed inherent in overly partisan programming. The doctrine required coverage of controversial issues of public importance and presentation of contrasting points of view on those issues. In 1963 the Doctrine was expanded by the Cullman decision which "provides that a licensee cannot refuse to air an unpaid presentation otherwise suitable for broadcast if: 1) the licensee has broadcast a sponsored program which for the first time presents one side of a controversial issue; 2) the licensee has not presented (or does not plan to present) contrasting viewpoints... and 3) the licensee has been unable to obtain paid sponsorship for the appropriate presentation of opposing viewpoints."[3]

The doctrine was also expanded with the implementation of the "personal attack" rule in 1962. It requires that when an attack is made on the "honesty, character, integrity or the like of personal qualities of an individual or group" during the broadcast of a controversial issue of public importance, the broadcaster must notify the attacked individual or group, provide a transcript of the attack, and offer a reasonable opportunity to respond over the broadcaster's facilities.[4]

The issue of controls over broadcasters came to a head in the Red Lion Broadcasting case, which centered on the constitutionality of the "personal attack" rule.[5] The circumstances of this case were similar to those of Miami Herald. Red Lion Broadcasting Company owned a small radio station, WGCB, in Red Lion, Pennsylvania, a town of fewer than 6,000 persons. Listeners in the town were able to receive over 20 other radio signals in 1964, the time of this incident. They also had access to cable television, of which about half the households took advantage. There was, in short, no scarcity of electronic informational services in Red Lion. During the election of 1964, WGCB aired a five-minute syndicated editorial by the Reverend Billy James Hargis of the "Christian Crusade." In the editorial, Hargis attacked a member of the staff of the Democratic National Committee named Fred Cook. Neither Cook nor Hargis were members of the community of Red Lion, Pennsylvania.

Cook demanded time for a response to Hargis' editorial.[6] WGCB said that Cook would have to pay for his response time; the cost would be $5. Cook refused and the case wound up before the Supreme Court in 1969. The Court ruled in favor of Cook, sticking to the old argument that broadcasting frequencies on the electromagnetic spectrum are scarce, hence the use of the spectrum must be regulated to assure balance and fairness. As this case shows, the fairness doctrine provides various interest groups with a means by which to harass broadcasters with threats of demands for free time. Phyllis Schlafly, the head of the Eagle Forum, successfully used the doctrine to keep editorials favoring the Equal Rights Amendment off the air. Ralph Nader,

the consumer advocate, uses the doctrine to keep from the air editorials and issue advertisements inimical to his position. Two chief difficulties broadcasters face are determining which groups meet the FCC's standard for qualifying as a "responsible element" in the community, and which issues are "controversial" and "important" to the community.

Perhaps the most egregious extension of the fairness doctrine came with its application to television advertising. Here is the way the rule worked: Lee Iacocca was free to talk about the virtues of his American cars and their Japanese engines. But if Iacocca wanted to spend the 60 seconds his company bought arguing in favor of mandatory seat belt laws, he would effectively be precluded from doing so because stations or networks running the ads would face "fairness complaints" and be forced to defend their decision before the FCC or would have to capitulate to requests for free time for those with contrasting views. In this case, that would mean giving time to Ralph Nader to explain why air bags are better than seat belts and to the Libertarian Party to explain why the government has no right to order you to wear seat belts in your own car.[7]

If the hypothetical example seems absurd, reality bordered on insanity in application of the doctrine. W.R. Grace and Company recently tried to air advertisements arguing against government waste and the deficit. The ads featured a courtroom set in the next century where a senior citizen is on the witness stand being grilled by an adolescent prosecutor in front of a jury of children. "Didn't you know what your deficits would do"

to our future? he is asked. The old witness, dressed in rags, as are the jurors, withers under this attack and begs forgiveness. While some independent stations ran this ad, the networks found it too controversial. Finally, ABC relented and agreed to run the ad after 11:30 pm; then CBS said they would run it if wording that referred to a Constitutional amendment to balance the budget were removed.

Mobil Oil offered to pay for the response time of those wishing to present contrasting views to their advertisements dealing with public issues. The networks turned Mobil down because they would be put in the position of having to decide who should be chosen to respond to Mobil, a position fraught with litigious possibilities.

Today, electronic media remain subject to governmental evaluation of the content of what is broadcast, and the Red Lion case provides the operant precedent. The printed media are free from such controls, and the Miami Herald case provides the operant precedent. The irony is that the number of television stations nearly equals the number of daily newspapers and that there are about eight times as many radio stations as there are sources in the other media. Yet television, radio, and even cable programmers can be subject to the fairness doctrine because they supposedly use "scarce" resources.[8]

There are many problems with the "scarcity rationale." First, it was clearly not a concern of the Founders when they drafted and submitted the First Amendment to the states for ratification. Only a handful of newspapers existed at that time.[9] They were expensive to produce and hence a scarce

voice. Existing newspapers were highly partisan; there was generally no effort to print "balanced" reporting. Nonetheless, despite scarcity and partisanship, the press was formally protected from governmental intrusion. Furthermore, those who formed and adopted the First Amendment were fully aware that all presses had been licensed in England since the time of Henry VIII. They quite specifically chose not to follow this practice, demonstrating that they accepted neither scarcity nor partisanship as a ground for imposing controls on freedom of expression.

Second, "scarcity" is a relative term that provides government with a dangerous method of controlling the media. Judge Robert Bork understood this well in his recent decision in the TRAC case. He wrote:

> It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media. All economic goods are scarce, not least the newsprint, ink, delivery trucks, computers, and other resources that go into the production and dissemination of print journalism. Not everyone who wishes to publish a newspaper, or even a pamphlet, may do so. Since scarcity is a universal fact, it can hardly explain regulation in one context and not another .... One might attempt to resolve the tension between [Miami Herald] and Red Lion on the ground that, while scarcity characterizes both print and broadcast media, the latter must be operating under conditions of greater "scarcity"

than the former. This, however, is unpersuasive. There is nothing uniquely scarce about the broadcast spectrum.[9]

Bork recognized that today's media marketplace is characterized by great abundance and diversity. There are now 10,128 radio stations and 1,315 television stations.[10] Television reaches 98.2 percent of all U.S. households. Ninety-six percent of all households with television receive five or more stations; 71 percent of those households receive nine or more stations. Today, there are approximately 7,300 cable systems in the United States reaching 40 million subscribers, 46 percent of the nation's television households.[11] Cable is now available to more than two-thirds of American homes and the percentage is growing weekly. Additionally, the Cable Communications Policy Act of 1984 allows communities to establish public, educational, and governmental access channels on their local cable systems. Besides ABC, CBS, NBC, and CNN, many local stations are using satellite transmissions to produce their own national news programs. Fifty stations have already formed a consortium which uses local satellite vans to transmit news from almost anywhere in the country for only $15 a minute. Group broadcast owners,[12] such as Westinghouse, Storer, and Taft, are not only developing alternate programming, they are developing strong news services. For example, Westinghouse has developed Newsfeed, which now serves at least 80 local stations and bypasses the networks.

Without reviewing the growth of radio, multi-point distribution systems, and satellite relays, I have said enough to show that there is no scarcity of diverse sources of news and

opinion. The problem is trying to choose among all of the available sources.

In the Miami Herald case, the Supreme Court considered a newspaper reader sophisticated and intelligent enough to form his or her own opinion. In Red Lion, however, the radio listener was treated as one who must be protected by a governmental agency which assures "fairness." What makes this proposition especially suspect is that the newspaper reader and radio listener could be the same person, and the news they receive could very well come from the same source, say the AP or UPI wire. Furthermore, while the newspaper reader only has the choice of reading the paper or putting it aside, the radio listener has a plethora of stations to listen to, as well as the option of turning off the broadcast. It is therefore very odd that the scarcity rationale continues to be applied to the electronic media rather than to the print media. Such considerations forced Justice William O. Douglas to conclude:

> Television and Radio ... are ... included in the concept of press as used in the First Amendment and therefore are entitled to live under the laissez-faire regime which the First Amendment sanctions.[13]

The Burden of Regulation

Abiding by the fairness doctrine on a case-by-case basis was one condition the government imposed on broadcasters in exchange for a license. When a station's license came up for renewal, a government agency examined the station's files to determine

whether the broadcaster had been "fair" and "operating in the public interest" for the time the broadcaster has held the license. If there had been no complaints and the station had complied with technical and other rules, renewal was relatively automatic in the majority of cases. However, if a question was raised concerning whether, during the previous license term, the station had operated "in the public interest," a formal evidentiary hearing must be held, which is both costly and time consuming. According to a National Association of Broadcasters survey among 40 license renewal proceedings, the average case lasted eight years.[14] Radio stations spend an average of $600,000 and television stations $1.2 million for legal fees in contested cases. But the costs do not stop there. Stations must bear the cost of providing "public affairs" programming, which consistently draws the least audience and is therefore the hardest for which to find advertising. In certain instances they must also provide free time for responses.

Many "fairness complaints" were made but few were judged appropriate for hearing. In the three years from 1973 to 1976, 13,800 complaints were filed. That is an average of 1.3 complaints per station over a three year period. Less than eleven of these complaints resulted in any formal sanctions. Between 1980 and 1986, only twenty broadcasters were found to have violated the fairness doctrine, 132 additional cases went through a formal, serious hearing, and thousands were dismissed as frivolous or unworthy of review. On this evidence it is apparent that most complaints are groundless. [15] The complaint procedure did, however, harass stations because

broadcasters had difficulty determining which specific complaints will be taken seriously by the FCC. For example, NBC and one of its local affiliates became embroiled in a fairness complaint concerning their broadcast of the mini-series "Holocaust." A Friedrich Berg filed a complaint, arguing that the April, 1978 "docu-drama" was "generally anti-German and pro-Jewish." He demanded an opportunity to oppose and refute the "allegation of a German policy of Jewish extermination during World War II," which he contended was a controversial issue of public importance under the fairness doctrine. It was a year before the case was dismissed. I have also shown that unlike their print brethren, broadcasters are subject to both libel laws and to the "personal attack" rule. The "personal attack" rule puts a broadcaster at risk for editorializing about public persons and groups (see Red Lion). Under the circumstances, the electronic media are discouraged from making attacks on the public officials and the actions those officials take.

Government-imposed programming standards also lead to uniform, bland programming and to costs in terms of foregone business opportunities. Let me cite just one case of how the rules can work.

Simon Geller obtained a license to operate a daylight FM radio station from his apartment over the Whale-of-a-Wash laundromat in Gloucester, Massachusetts in 1961. He experimented with various formats and examined what was available to his listeners on other stations. Geller, who was the sole operator of the station, decided to play only classical

music -- no all-talk, no news, no accu-weather -- just classical music. Geller's operating costs were covered by small donations from the public and six minutes of advertising by local businesses.

In 1977, the FCC felt obligated by the rules to delay his license renewal, despite the fact that there were at least 35 other stations in the Boston area available tc Geller's listeners, including an all-news station. In 1982, the FCC decided to award Geller's license to Grandbanke Corporation, claiming that Grandbanke would better serve the public interest. Community groups immediately petitioned the FCC to reverse the decision. One group of 5,000 argued that Geller's classical music provided a unique service to the public. The FCC denied the petitions, but the U.S. Court of Appeals ordered the FCC to reconsider the case. The Court noted that the FCC had silenced Geller's ideas and for that the public suffered. Finally, on December 17, 1985, the FCC reversed itself and renewed Geller's license. Grandbanke appealed the decision and lost in the U.S. Court of Appeals in late 1986. The legal expense on all sides was substantial.

Many stations, hearing about Geller's plight, conform to what they <u>believe</u> are the FCC's standards for "public interest" broadcasting. In such an environment, the diversity of the marketplace is lost to intimidation.

One of the unstated assumptions in regulating broadcasting is that five men and women who sit on the Federal Communications Commission are better judges of what people should see and hear about controversial issues than are those who make up the

audience, or those who must compete for their attention.[16] Two important challenges of principle can be made against this assumption: 1) Is the listener's right to receive "balanced" programming superior to the right of a citizen to speak? 2) Is regulation of content of any medium of communication appropriate in a pluralistic and free society? A third, more pragmatic objection to governmental regulation of broadcasting media is that the threat of penalties weighs heavily on most broadcasters who lack resources with which to challenge "public interest violations." In fact, there is evidence that many broadcasters responded to the fairness doctrine by refusing to air anything controversial for fear of legal entanglements.[17]

Under the fairness doctrine, local stations often had trouble determining what a controversial issue was, how much time it should be given, and who in the community represented "responsible contrasting views." Even members of the FCC admit that the doctrine was abused because of the arbitrary way its rules had been applied. James McKinney, former Chief of the Commission's Mass Media Bureau, described how a "fairness assessment" was made:

> We ... sit down with tape recordings, video tapes of ... what has been broadcast on a specific station. We compare that to newspapers [and] other public statements that are made in the community. We try to make a decision as to whether it is of public importance in that community, which may be 2000 miles away [from our offices in Washington, D.C.].... When it comes down to the final analysis, we take out stop watches and we start counting the seconds and

> minutes that are devoted to one issue compared to the seconds and minutes that are devoted to the other side of the issue.[18]

Commissioner Mimi Dawson wrote in frustration, "It is virtually impossible for a broadcaster to read the [FCC's recent fairness decision] and know what its responsibilities are under the fairness doctrine."[19] In many cases, broadcasters have simply thrown up their hands and avoided controversial issues so that they will not have to endure the endless red tape of an FCC hearing, a court battle over access to their station, or worse, the loss of their license.

These financial threats hang over each and every television and radio station in this country, and many go to costly hearings before the FCC before they are resolved. It should, therefore, come as no surprise that many scholars who testified before hearings of the Senate Commerce Committee in 1982 and 1984 believed that existing rules had a chilling effect on the discussion of issues in the broadcasting media.

Defending against a "fairness complaint" is a sobering experience and indicates just how difficult insuring a "truth standard" and providing "contrasting views" can be. Consider the struggle of Eugene Wilken, former general manager of KREM-TV in Spokane, Washington. A complaint arose immediately following KREM's one-time airing of a 60 second editorial endorsement of EXPO 74. Four people identifying themselves as representatives of an environmental group entered the station's offices and demanded air time to rebut the editorial. Wilken asked for proof that they represented some "responsible" group in the

community. These "environmentalists" turned out to be a splinter group of eight neighbors who had broken off from the major environmental organization in the city. Wilken denied them access to the station's broadcast facility. They filed with the FCC. This seemingly minor confrontation snowballed into a major investigation during which KREM's staff was interviewed extensively by the FCC and KREM's files were searched. After $20,000 in legal fees, 480 hours of executive time, a delay in license renewal and four years of investigations and delays, KREM was exonerated. However, Wilken's career was ruined.

The examples cited here are not aberrations nor are they kept quiet. They are the source of the chill wind that blows across the entire broadcasting community. The current situation, which still includes a "personal attack" rule,[20] may be the reason that investigative reporting is more prominent in the print than in the electronic media. It surely explains the timid approach broadcasters take, compared to their print brethren, on issues of importance to the community or the nation.

But the "public interest" regulations also affect the print media. Those companies which own broadcast licenses, and most do, are targets for intimidation by the government or other parties. A 1969 memorandum from Jeb Magruder to Robert Haldeman proposed "an offical monitoring system through the FCC" and documented that Nixon had ordered his staff to take "specific action relating to what could be considered unfair news coverage" twenty-one times in one month. In a conversation with

John Dean and Haldemann, Nixon advocated using the license renewal procedure at the FCC to intimidate the Washington Post through their television stations:

> Nixon: The main thing is the Post is going to have damnable, damnable problems out of this one. They have a television station --
>
> Dean: That's right, they do.
>
> Nixon: And they're going to have to get it renewed.

Of course, it was the Post that was doing the very investigating that would eventually lead to Nixon's downfall. Had Nixon convinced others on his staff to use the FCC's power against the Post, American history might have been different.

One of the greatest dangers posed by government control over the content of electronic communications lies ahead. This danger also reveals a way by which a revived fairness doctrine could be applied to the print media. Technology is rapidly blurring the traditional line between print and broadcast journalism. With the advent of cable, videotex, and teletext, and the electronic delivery of news and other information, distinctions may soon be impossible to discern. USA Today and the Wall Street Journal already use satellites to beam their copy across the country to various printers. Many other newspapers are allowing their columns to be carried over videotex systems. In the coming years, the courts and the Congress are going to have face the difficult question of whether to extend the rights given to print to the electronic media or to impose the controls applied to electronics on the print media.

Perhaps that is why, in the summer of 1984, in FCC v. League of Women Voters of California, the Supreme Court in two footnotes questioned the wisdom of retaining the Red Lion precedent. Said the Court:

> We note that the FCC, observing that "if any substantial possibility exists that the [fairness Doctrine] rules have impeded, rather than furthered, First Amendment objectives, repeal may be warranted on that ground alone," has tentatively concluded that the rules, by effectively chilling speech, do not serve the public interest, and has therefore proposed to repeal them.... As we recognized in Red Lion, however, were it to be shown by the Commission that the fairness doctrine "has the effect of reducing rather than enhancing" speech, we would then be forced to reconsider the constitutional basis of our decision in that case.[21]

The Court went on to observe what any child who has access to a television set can see: the "scarcity of spectrum" rationale for the controls imposed by the government has been severely eroded. Given the explosion of electronic outlets such as cable, direct satellite broadcasts, and microwave signals, it is difficult to maintain that the electronic media should not be accorded parity with the print media. For that and other reasons mentioned above, the FCC repealed the fairness doctrine on August 4, 1987.

Conclusion

The printed press was afforded protection in America because it had played an important role in developing a consensus in favor of revolution, had been suppressed by English monarchs, and was familiar to the Founders. The electronic media of mass communication enjoy no such history. Their introduction as radio in 1906 and as commercial television in the 1930's scared legislators in much the same way the invention of moveable type in 1456 scared the Germanic princes. Supreme Court Justice William Brennan explained this phenomenon when he addressed the graduating class at Brandeis University in 1986:

> Rulers always have and always will find it dangerous to their security to permit people to think, believe, talk, write, assemble and particularly to criticize the government as they please. But the language of the First Amendment indicates that the founders weighed the risks involved in such freedoms and deliberately chose to stake this Government's security and life upon preserving the liberty to discuss public affairs intact and untouchable by Government.

In this environment the ideal of freedom of expression is pitted against channel-specific administrative regulation. Because freedom of expression is the foundation of all other rights, I believe it is desirable to apply the full rights of the printed press to all other media of mass communication on the ground that the original regulations of electronic channels are anachronistic and steadily becoming more so.

Without free speech, truth may not be discovered or retained. It emerges from and is refined by the competition of the open marketplace. While freedom of expression is expensive, it is undoubtedly worth the price because it ensures so many other liberties. Because of controls on the electronic media, we do not live in the environment suggested by the Founders. That circumstance can change if the Supreme Court overturns the controls over content or the Congress returns to the ideals of the Founders.

ENDNOTES

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[1] FCC, Inquiry into Section 73.1910 of Commission's Rules and Regulations Concerning Alternatives to the Fairness Doctrine, August 4, 1987, p. 51. See also Cullman Broadcasting Co., 40 FCC 576 (1963). The Cullman rule was repealed on August 4, 1987 along with the Fairness Doctrine. Rulings on the appeal to the U.S. Court Appeals are pending.

[2] Memorandum Opinion and Order in Docket No. 16574, 8 FCC 2d 721 (1967); Clayton W. Mapoles, 40 FCC 510 (1962); Times-Mirror Broadcasting Co., 40 FCC 531 (1962).

[3] 395 U.S. 367 (1969).

[4] It has since been learned that Cook selected Red Lion's station in order to intimidate small stations across the country in an effort to keep right-wing attacks on the Johnson Administration off the air. Edward R. Murrow's producer, Fred Friendly, discovered that Cook had been working with Democratic Party officials in a campaign to suppress right-wing opinion on radio by means of the Fairness Doctrine. This plan began in the Kennedy Administration and was carried on by Lyndon Johnson. See David Kelly and Roger Donway, Laissez Parler: Freedom in the Electronic Media (Bowling Green, Ohio: Bowling Green University Center for Social Policy and Philosophy, 1983), p. 32.

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[5] Those seeking free time are supposed to demonstrate that they do not have the money for paid advertising. Nader accomplishes this by operating a nonprofit organization which spends its advertising budget on the print media.

[6] I say "can be" because the TRAC decision of 1986 leaves the matter in the hands of the F.C.C. And on August 4, 1987, the F.C.C. repealed the Fairness Doctrine, including the Cullman rule, but excluding the "personal attack" rule. This does not resolve the matter, however, since a future F.C.C. could reimpose the Doctrine. That is why groups on both sides of this issue are supporting efforts to obtain a definitive ruling from the Supreme Court which either reaffirms or overturns the Red Lion decision.

[7] Eight daily and 70 weekly newspapers were published in 1791.

[8] Telecommunication Research and Action Center v. FCC, No. 85-1160, Slip. Op. at 15, 16, n. 4 (D.C. Cir. Sept. 19, 1986), petition for rehearing en banc denied, Dec. 16, 1986.

[9] This does not count the rapidly growing number of low power television stations which stood at nearly 400 in August of 1987.

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[10] See Broadcasting/Cablecasting Yearbook D-3, 1986.

[11] CBS v. Democratic National Committee, 412 U.S. 94, 161 (1973), concurring opinion.

[12] For a full reading on the comments of scholars, broadcasters and other expert witnesses with regard to this and other points in this section, I recommend, Freedom of Expression Act of 1983: Hearing before the Senate Committee on Commerce, Science and Transportation, 98th Congress, 2nd Session, 1984.

[13] For example, the FCC assumes that operating in the public interest means broadcasting the news on a regular basis and providing public affairs and other non-entertainment programming beyond those broadcasts. Why having all stations broadcast news to the exclusion of other programming is in the public interest has not been addressed by the FCC. In most markets, all-news stations are ranked very high in listeners' ratings. In 1986, for example, all-news radio formats ranked second in San Francisco and Philadelphia, fourth in Detroit, and third in Dallas. Where all-news stations were not in the top five of the ratings, hourly news and all-talk formats were. Since most news programming makes money, it is unnecessary to require that it be carried. A survey conducted by Professor Vernon Stone, Director of the School of Journalism, Southern Illinois University in

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1983 revealed that 85 percent of all stations reported that news either pays for itself or makes a profit. In a follow-up survey published in 1984, Stone found that radio deregulation had "caused no change in news or public affairs staffing or programming at the great majority of stations." See RTNDA Communicator (May, 1985) p. 14.

[14] Testimony before the Senate Commerce Committee Hearings in 1984 (op. cit.) revealed that broadcasters have refused to show documentaries for fear of legal action, and they have given in to demands for responses to Presidential speeches. Under legislation introduced by Senator Hollings in late 1987, a broadcaster who was found to have violated the fairness doctrine would pay a higher tax on the transfer of the station when it was sold. The legislation was defeated in a conference committee of the Congress.

[15] Fairness Report, 58 Rad. Reg. 2d (P&F) (1985) at 1175 n. 174.

[16] Dissent in Complaint of Syracuse Peace Council against Television Station WTVH, 99 F.C.C. 2d 1389, 57 Rad. Reg. 2d (P&F), 519 (1984) at 10.

[17] 104 S. Ct. 3106, 3117, n.12 (1984).